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Supreme Court, U.S.
FILED

No. 02- 02 634 OCT 23 2002

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

GREEN TREE FINANCIAL CORP. a/k/a GREEN TREE ACCEPTANCE CORP. a/k/a GREEN TREE FINANCIAL SERVICES CORP. n/k/a CONSECO FINANCE CORP.,

Petitioner,

v.

LYNN W. BAZZLE AND BURT A. BAZZLE, In A Representative Capacity On Behalf Of A Class And For All Others Similarly Situated; DANIEL B. LACKEY, GEORGE BUGGS AND FLORINE BUGGS, In A Representative Capacity On Behalf Of A Class And For All Others Similarly Situated,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

PETITION FOR WRIT OF CERTIORARI

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

150 pp

QUESTION PRESENTED

Whether the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, prohibits class-action procedures from being superimposed onto an arbitration agreement that does not provide for class-action arbitration.

LIST OF PARTIES AND AFFILIATES

The parties to the proceedings are listed in the caption of the decision of the Supreme Court of South Carolina. Pet. App. 1a.

Pursuant to Rule 29.6 of the Rules of this Court, Petitioner Green Tree Financial Corp. is now known as Conseco Finance Corp. Petitioner is a wholly-owned subsidiary of Conseco, Inc., an Indiana corporation whose stock is publicly traded. No publicly owned company owns ten percent or more of the stock of Conseco, Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Green Tree Financial Corp. ("Green Tree") respectfully requests that this Court grant its petition for a writ of certiorari to review the decision and judgment of the Supreme Court of South Carolina.

OPINIONS BELOW

The opinion of the Supreme Court of South Carolina is published at 569 S.E.2d 349 (S.C. 2002) and appears in the Appendix of this Petition ("Pet. App.") at 1a-26a. The South Carolina Court of Common Pleas' Order confirming the arbitral award and denying Green Tree's motion to vacate in *Bazzle* v. *Green Tree Financial Corp.* is unpublished and

appears at Pet. App. 27a-35a. The South Carolina Court of Common Pleas' Order confirming the final award in arbitration and denying Green Tree's motion to vacate in *Lackey* v. *Green Tree Financial Corp.* is unpublished and appears at Pet. App. 36a-54a. The final order and award in arbitration in *Bazzle* appears at Pet. App. 55a-81a, and the final order and award in arbitration in *Lackey* appears at Pet. App. 82a-109a.

JURISDICTION

The Supreme Court of South Carolina entered its final judgment on August 26, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT STATUTORY PROVISIONS

The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, mandates enforcement of the terms of arbitration agreements contained in contracts evidencing transactions in interstate commerce. In particular, Section 2 of the FAA, 9 U.S.C. § 2, provides that such agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.*

STATEMENT OF THE CASE

In its decision below, the Supreme Court of South Carolina rejected Green Tree's challenge under the FAA to two interrelated class-action arbitration awards. Those two awards require Green Tree to pay nearly $27 million in statutory damages, attorney's fees and costs to two classes consisting of a total of more than 3,700 individuals. Green Tree challenged those arbitral awards in the Supreme Court of South Carolina because the arbitration agreement underlying them does not provide for class-action arbitration, and the FAA does not permit class-action procedures to be superimposed onto that arbitration agreement. In affirming these awards, the Supreme Court of South Carolina rejected that showing and issued a decision that deepened an already

mature judicial conflict on the question whether the FAA permits class-action procedures to be engrafted onto an arbitration agreement that does not, by its terms, provide for class-action arbitration.

The Supreme Court of South Carolina acknowledged that, on one side of this conflict, a majority of the federal courts of appeals have held that class-wide or consolidated arbitration proceedings cannot be imposed on an arbitration agreement that is "silent" as to those issues. Pet. App. 12a-13a (analyzing *Champ* v. *Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995)). The decision below also recognized that, on the other side of the conflict, the California Supreme Court and its appellate courts have ruled that class-action procedures can be imposed on arbitration agreements that are "silent" regarding the availability of class-action arbitration. Pet. App. 13a-16a (discussing *Keating* v. *Superior Ct.*, 645 P.2d 1192, 1208-09 (Cal. 1982), *rev'd on other grounds sub nom.* 465 U.S. 1 (1984); *Blue Cross of Cal.* v. *Superior Ct.*, 67 Cal. App. 4th 42, 62-66 (1998)). After analyzing these competing lines of precedent, the Supreme Court of South Carolina highlighted that "[t]he United States Supreme Court has not addressed this issue and the precedent set by the federal circuit courts is not binding on this Court." Pet. App. 22a.

Thereafter, the court rejected the approach taken by the *Champ* line of cases, adopted the "approach taken by the California courts in *Keating* and *Blue Cross*," and held that "class-wide arbitration may be ordered when the arbitration agreement is silent *if* it would serve efficiency and equity, and would not result in prejudice." Pet. App. 22a (emphasis added) (footnote omitted). The South Carolina Supreme Court's holding was based expressly upon its prior determination that "a state court may order *consolidation* of claims subject to mandatory arbitration without any contractual . . . directive to do so." Pet. App. 21a. Because it had permitted "consolidation of appropriate claims where the

arbitration agreement is silent," the court held that it "would permit class-wide arbitration, as ordering class-wide arbitration calls for considerably less intrusion upon the contractual aspects of the relationship." Pet. App. 21a (internal quotation marks omitted).

As shown below, this case squarely presents a recurring issue of paramount importance to the congressional scheme governing arbitration under the FAA that has generated a substantial conflict among the federal courts of appeals and state appellate courts and courts of last resort. As a result, Green Tree respectfully submits that its petition for a writ of certiorari should be granted to allow this Court to address and resolve this important decisional conflict.

Statutory Background

Section 2 of the FAA provides that arbitration agreements subject to the FAA "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As this Court has explained, Congress's goal in enacting the FAA was to overcome deep-seated judicial hostility to arbitration and thereby allow private parties to choose to resolve their disputes through arbitration rather than litigation. See, *e.g.*, *Volt Info. Scis. Inc.* v. *Board of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989); *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 219-20 (1985). Specifically, the FAA permits private parties to "'trade[ ] the procedures . . . of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (quoting *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). Moreover, because judicial hostility to arbitration had existed in both federal and state courts, this Court concluded almost 20 years ago, and more recently has reaffirmed, that § 2 of the FAA applies both in state and federal courts. *Southland Corp.* v. *Keating*, 465 U.S. 1, 12-15 (1984); see *Allied-Bruce Terminix*

Cos. v. *Dobson*, 513 U.S. 265, 272 (1995) (reaffirming *Southland*).

Essential to Congress's goal of ensuring the enforcement of parties' agreements to arbitrate is the principle that such agreements may not be rewritten by courts. Rather, state and federal courts must "'rigorously enforce' such agreements according to their terms." *Volt*, 489 U.S. at 479 (quoting *Dean Witter*, 470 U.S. at 221). Indeed, this Court repeatedly has explained that "the central purpose of the Federal Arbitration Act [is] to ensure 'that private agreements to arbitrate are enforced according to their terms.'" *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995) (quoting *Volt*, 489 U.S. at 479).[1]

Arbitration "'is usually cheaper and faster than litigation.'" *Allied-Bruce*, 513 U.S. at 280 (quoting H.R. Rep. No. 97-542, at 13 (1982)); see also *Dean Witter*, 470 U.S. at 220; *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 947 (1995). Nevertheless, the "basic objective" under the FAA "is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, but to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms and according to the intentions of the parties." 514 U.S. at 947 (citations and internal quotation marks omitted). Indeed, the FAA "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement . . . . notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement." *Moses H. Cone Mem'l Hosp.* v.

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[1] *See also Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 688 (1996) (enforcement of agreement according to terms is "the very purpose of the Act"); *Volt*, 489 U.S. at 476 ("[T]he federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate."); *see also E.E.O.C.* v. *Waffle House, Inc.*, 122 S. Ct. 754, 764 (2002) ("Arbitration under the [FAA] is a matter of consent, not coercion.") (alteration in original) (quoting *Volt*, 489 U.S. at 479).

Mercury Constr. Corp., 460 U.S. 1, 20 (1983) (footnote omitted).

Factual Background

A review of the proceedings leading to the two class-action arbitral awards and the decision of the Supreme Court of South Carolina is necessary to put this case in proper context.

The Bazzle Proceedings. In 1995, Lynn and Burt Bazzle executed a retail installment contract and security agreement with Green Tree to finance home improvements. The agreement entered into by the Bazzles contained an arbitration clause which provided, in pertinent part:

> ARBITRATION – All disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract, or the validity of this arbitration clause or the entire contract, shall be resolved by binding arbitration by one arbitrator selected by us with consent of you. This arbitration contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. section 1. Judgment upon the award rendered may be entered in any court having jurisdiction. The parties agree and understand that they choose arbitration instead of litigation to resolve disputes. The parties agree and understand that they have a right or opportunity to litigate disputes through a court, but that they prefer to resolve their disputes through arbitration . . . .

Pet. App. 110a. The agreement, by its terms, dictates that it will be governed "by the Federal Arbitration Act," *id.*, and limits its scope to "disputes, claims, or controversies arising from or relating to *this* contract or the relationships which result from *this* contract." *Id.* (emphasis added). By limiting the arbitrator's authority to address claims or relationships that result from "*this* Contract," the agreement precludes consolidated or class-wide arbitration of disputes involving

other contracts. The arbitration agreement is reproduced in full at Pet. App. 110a-111a.

Notwithstanding their agreement to arbitrate, on March 25, 1997, the Bazzles filed an action against Green Tree in South Carolina state court alleging violations of the attorney and insurance-agent notice preference provisions of South Carolina law. See S.C. Code Ann. §§ 37-10-102(a), -105. On April 21, 1997, the Bazzles filed an amended class-action complaint and, at the same time, a motion for class certification. In response to these pleadings, Green Tree sought a stay of the court proceedings (including the motion for class certification) and an order compelling arbitration. Green Tree explained that an order compelling arbitration, if granted, would preclude class-action treatment. On December 5, 1997, the trial court granted the Bazzles' motion for class certification (thereby denying Green Tree's motion for a stay of all proceedings) and entered an order compelling arbitration. Pet. App. 3a.[2]

After the trial court entered an order appointing an arbitrator, the class-action arbitration proceedings ordered by the trial court were administered solely by the arbitrator. On July 24, 2000, the arbitrator issued an award against Green Tree on behalf of a class of 1,899 individuals. The arbitrator acknowledged that "Plaintiffs as a class did not attempt to show actual damages," Pet. App. 69a, but he nevertheless imposed a class-wide "penalty" upon Green Tree of between $5,000 and $7,500 "per transaction," which resulted in a total award of $10,935,000 in statutory damages. *Id.* at 71a.

The arbitrator also awarded plaintiffs $3,645,500 in attorney's fees based upon not only their prosecution of the

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[2] On March 17, 1998, the trial court denied Green Tree's motion to reconsider the order granting class certification. Green Tree filed an appeal challenging the trial court's order certifying a class for arbitration, but the appeal was dismissed by the court of appeals as interlocutory. Pet. App. 28a.

arbitration, but also, among other things, their lobbying efforts during the 1997 South Carolina legislative session. Pet. App. 77a, 79a. The arbitrator rejected Green Tree's showing that "if every hour submitted by Plaintiffs is allowed, a $3,000,000 attorney's fee award would result in an hourly rate exceeding $900.00 per hour." R. on Appeal at 2126. Moreover, the arbitrator ordered that funds awarded to class members that remained unclaimed would not be returned to Green Tree, but instead would be tendered to charitable groups chosen by plaintiffs' counsel: "75% of such funds to the South Carolina School of Law, 9% to the South Carolina Habitat for Humanity, 8% to the Shriner's Hospital and 8% to Global Outreach." Pet. App. 79a.

The Bazzles filed a motion to confirm the award in the state trial court, and Green Tree sought to vacate the award. Green Tree showed that class-action arbitration had been ordered by the trial court even though the arbitration agreement did not provide for class-action arbitration. On September 15, 2000, the trial court confirmed the arbitral award and denied Green Tree's motion to vacate. Pet. App. 34a. In its order, the trial court stated that it "previously ruled on Green Tree's motion for reconsideration of class certification" and saw "no basis to address the issue again." *Id.*

The Lackey Proceedings. Daniel Lackey (and his fellow class members) entered into consumer installment contracts and security agreements with Green Tree for the purchase of manufactured homes. These agreements contained an arbitration clause that is in all relevant respects identical to the arbitration agreement in the *Bazzle* proceeding. Pet. App. 19a n.18.

Notwithstanding their agreements to arbitrate, on May 28, 1996, Lackey and George and Florine Buggs commenced a class action against Green Tree in state court, also alleging violations of the attorney and insurance-agent notice preference provisions of South Carolina law. Green Tree filed a motion seeking to compel arbitration, but the trial

court ruled that Green Tree's arbitration agreement was unenforceable. Pet. App. 5a-6a. Green Tree appealed, and the court of appeals reversed, holding that the arbitration agreement should be enforced. See *Lackey* v. *Green Tree Fin. Corp.*, 498 S.E.2d 898, 905 (S.C. Ct. App. 1998). Thereafter, the same arbitrator who was presiding over the *Bazzle* proceeding was appointed as arbitrator in the *Lackey* proceeding.

The *Lackey* plaintiffs expressly argued, based upon the decision of the trial court in the *Bazzle* proceeding, that the arbitration should proceed as a class-action arbitration. Pet. App. 5a-6a. Specifically, the *Lackey* plaintiffs contended that class-action arbitration should proceed because

> [i]n a similar action pending against the Defendant in Dorchester County, *Bazzle* v. *Green Tree Financial Corporation et al.*, Civil Action Number 97-CP-18-258, the issue of class action proceeding in arbitration was thoroughly presented in hearings before The Honorable Patrick R. Watts, Special Circuit Judge. The court found that a class action could proceed in arbitration . . . .

R. on Appeal at 516. The arbitrator accepted this argument. As a result, the arbitrator followed the approach mandated by the trial court in *Bazzle*, certified a class-wide arbitration and approved a class notice that was sent to class members.

On the merits, the arbitrator concluded that Green Tree had violated the attorney and insurance-agent notice preference requirements of South Carolina law. Pet. App. 91a. As in *Bazzle*, the arbitrator acknowledged that "plaintiffs as a class did not attempt to show actual damages," *id.* at 96a, but he nevertheless imposed a "penalty" of "$5,000 per transaction," for a total of $9,200,000 in statutory damages to the 1,840 class members, *id.* at 98a. The arbitrator also required Green Tree to pay $3,066,666 in attorney's fees (and $18,252 in costs), and, as in *Bazzle*, relied upon plaintiffs' counsel's lobbying efforts to justify a fee award that would compensate

plaintiffs' counsel at a rate in excess of $900.00 per hour. *Id.* at 105a-106a. Finally, as in *Bazzle*, the arbitrator concluded that any unclaimed funds would not be returned to Green Tree, but instead would be distributed to charitable organizations chosen by plaintiffs' counsel. *Id.* at 107a.

The trial court confirmed the award and denied Green Tree's motion to vacate. Green Tree timely appealed. Pet. App. 8a.

Decision of the Supreme Court of South Carolina

The Supreme Court of South Carolina assumed jurisdiction over the *Bazzle* and *Lackey* appeals and consolidated the proceedings. Pet. App. 2a. The court below first ruled that both arbitration agreements were "governed by the FAA." *Id.* at 11a & n.9. The court then addressed "the FAA's impact on class-wide arbitration." *Id.* at 11a. It noted that the "United States Supreme Court has not addressed" that issue, and "[t]hus, there is no binding precedent that this Court is obligated [to] follow." *Id.* The Supreme Court of South Carolina recognized, however, that "[s]everal federal circuits have precluded class-wide arbitration when the arbitration agreement is silent," whereas "the California courts have permitted class-wide arbitration on a case by case basis when the arbitration agreement is silent." *Id.* at 11a, 12a.

Although the arbitration agreements in these cases, by their terms, limit arbitration to "'disputes, claims, or controversies arising from or relating to *this contract*, or relationships which result from *this contract*,'" the court below concluded that "this language does not limit the arbitration to non-class arbitration." Pet. App. 19a (emphasis added by court). Specifically, the court ruled that this language "creates an ambiguity" that the court would construe against Green Tree to conclude that "Green Tree's arbitration clause was *silent* regarding class-wide arbitration." *Id.*

Given its determination that the agreement was "silent" as to the availability of class-action arbitration, the court

recognized that this case implicated the conflict between the rule in the *Champ* line of cases decided by the federal courts of appeals and the rule adopted by the California state courts. The court below rejected the *Champ* line of cases, explaining that the "United States Supreme Court has not addressed this issue and the precedent set by the federal circuit courts is not binding on this Court." Pet. App. 19a-20a. The court below explained that it previously had "held that a state court may order *consolidation* of claims subject to mandatory arbitration without any contractual or statutory directive to do so." *Id.* at 21a (relying upon *Episcopal Hous. Corp.* v. *Federal Ins. Co.*, 255 S.E.2d 451, 452 (S.C. 1979)); see *id.* at 18a-19a. The court reasoned that because it "permits consolidation of appropriate claims where the arbitration agreement is silent"—*i.e.*, where there is no "contractual . . . directive to do so"—"it follows that [it] would permit class-wide arbitration, as ordering class-wide arbitration calls for considerably less intrusion upon the contractual aspects of the relationship." *Id.* at 21a (internal quotation marks omitted).

Based upon this reasoning, the court below "adopt[ed] the approach taken by the California courts" and held "that class-wide arbitration may be ordered when the arbitration agreement is silent if it would serve efficiency and equity, and would not result in prejudice." Pet. App. 22a. Although the arbitral awards in these cases gave each class member a minimum recovery of $5,000 to $7,500, plus attorney's fees, the court suggested that absent class-wide arbitration, "parties with nominal individual claims . . . would be left with no avenue for relief." *Id.* The court further concluded that class-action arbitration was appropriate because "hearing such claims (involving identical issues against one defendant) individually, in court or before an arbitrator, does not serve the interest of judicial economy." *Id.* Because the court concluded that the imposition of class-action procedures onto a "silent" arbitration agreement was a permissible, albeit

discretionary, option, it upheld the arbitral awards in both *Bazzle* and *Lackey*. *Id.* at 23a.

REASONS FOR GRANTING THE PETITION

Further review by this Court of the decision of the Supreme Court of South Carolina is necessary to ensure the proper and uniform resolution of a recurring and important issue under the Federal Arbitration Act ("FAA") that has generated a substantial conflict among federal courts of appeals and state appellate courts and courts of last resort. Specifically, this case presents the question whether the FAA permits class-action procedures to be imposed on an arbitration agreement that is "silent" as to class-action arbitration.

The clear majority of courts that have addressed this question and the related issue of consolidation of arbitration proceedings have answered no. These courts have held that, under the FAA, the parties' silence on the question of class-action or consolidated arbitration precludes imposition of class-action or consolidated arbitration proceedings onto the parties' agreement. See, *e.g.*, *Champ* v. *Siegel Trading Co.*, 55 F.3d 269, 274-75 (7th Cir. 1995) (citing cases). In doing so, these courts have relied upon this Court's decisions, which hold that the FAA was designed to overcome judicial hostility to arbitration by mandating that arbitration agreements be enforced rigorously in accordance with their terms. See, *e.g.*, *Volt*, 489 U.S. at 478.

The Supreme Court of South Carolina acknowledged the clear rule of these cases, which prohibit class-action procedures from being superimposed on a "silent" arbitration agreement, but expressly rejected that rule in favor of the minority approach first embraced by the California courts. See, *e.g.*, *Keating* v. *Superior Ct.*, 645 P.2d 1192, 1208-10 (1982), *rev'd on other grounds sub nom.* 465 U.S. 1 (1984); *Blue Cross of Cal.* v. *Superior Ct.*, 67 Cal. App. 4th 42, 62-66 (1998) (following *Keating* and rejecting *Champ* line of cases).

This minority approach holds that the FAA does not prohibit a court from imposing class-action or other procedures onto an arbitration agreement; rather, class-action procedures may be imposed, in the court's discretion, if they further the court's notions of judicial efficiency and equity. Pet. App. 13a-16a. Put another way, the minority approach permits courts to frustrate private agreements to arbitrate by allowing those agreements to be modified whenever they do not unambiguously preclude a procedure or result that a court, in its discretion, believes will "serve efficiency and equity, and would not result in prejudice." *Id.* at 22a.

This minority approach ignores that the FAA is designed to allow parties to choose arbitration rather than litigation by mandating that courts enforce such agreements in accordance with their terms. Moreover, the minority approach cannot be reconciled with this Court's decisions which make clear that concerns regarding efficiency and economy are subsidiary to enforcement of the parties' agreement according to its terms. Indeed, under the minority approach adopted by the court below, parties' agreements to arbitrate would be subject to the same judicial hostility that the FAA was designed to combat when it was enacted more than 75 years ago. That result frustrates congressional intent that arbitration agreements must be enforced according to their terms. Further, adoption of this approach would increase the costs of private arbitration by obligating parties to draft long and unwieldy arbitration agreements that seek to anticipate and address every possible procedural contingency to prevent additional procedures from being imposed upon the parties' private agreement in the putative interests of judicial economy and efficiency.

Finally, the conflict implicated by the decision of the South Carolina Supreme Court is one of paramount importance because, without a uniform nationwide standard, the determination whether class-action arbitration can be compelled will turn on the happenstance of geography, rather

than the intent of parties as expressed in the terms of their arbitration agreements. A uniform national rule is vital because the same arbitration agreements often may apply to agreements entered across the country. Moreover, the absence of a uniform standard fosters not only geographic forum shopping but also forum shopping between federal and state courts. See *Southland*, 465 U.S. at 15 (rejecting interpretation of FAA that would "encourage and reward forum shopping").

In sum, certiorari should be granted to resolve this deep and recurring conflict and to adopt the majority view that the FAA mandates that arbitration agreements be enforced according to their terms and not on the basis of ambiguous policy choices of a court's making.

I. THE DECISION BELOW IMPLICATES A DEEP AND MATURE CONFLICT ON THE QUESTION WHETHER THE FEDERAL ARBITRATION ACT PERMITS CLASS-ACTION PROCEDURES TO BE IMPOSED ON AN ARBITRATION AGREEMENT THAT DOES NOT PROVIDE FOR CLASS-ACTION ARBITRATION.

The decision of the Supreme Court of South Carolina deepens a conflict among both state and federal courts on the recurring and important question whether the FAA permits class-wide arbitration where the parties' arbitration agreement is "silent," *i.e.*, it does not expressly provide for or against class-action arbitration. As shown below, the majority of courts, including the Seventh Circuit, Eighth Circuit and Alabama Supreme Court, have held that the FAA requires enforcement of private arbitration agreements according to their terms, and that courts therefore have no authority to order class-action arbitration where an arbitration agreement does not expressly provide for class-action arbitration. These decisions, in turn, are built on the decisions of the Second, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits, which hold

that a court has no authority to order consolidated arbitration if the parties' agreement does not so provide.

In stark contrast, the minority position, adopted by the court below and other state courts, holds that if the parties' agreement is "silent" regarding class actions—because it does not expressly preclude them—a court may, in its discretion, superimpose class-action arbitration if consistent with its notions of efficiency and equity. The minority position relies, among other things, on a decision of the First Circuit that permits consolidated arbitration even if the parties' agreement does not provide for it. The minority courts invoke the proposition that the FAA leaves them free to order arbitration upon terms as they see fit, so long as they do not *directly* contravene any provision of an agreement and do not require resort to a judicial rather than arbitral forum.

A. Courts Adopting The Majority Approach Have Held That The FAA Prohibits Class-Action Or Consolidated Arbitration Where The Individual Arbitration Agreement Does Not Provide For Either.

In *Champ* v. *Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995), the Seventh Circuit held that the FAA does not permit a court to order class-action arbitration where the arbitration agreement did not expressly provide for such a procedure. *Id.* at 275. Relying on this Court's decisions in *Volt*, *Dean Witter*, and *Moses H. Cone*, the *Champ* court rejected the argument that class-action arbitration was permissible so long as it "would not contradict" the terms of the agreement. *Id.* at 274-75. Rather, the Seventh Circuit concluded that the FAA reflects a responsibility "to enforce the type of arbitration to which these parties agreed, which does not include arbitration on a class basis." *Id.* at 277. In reaching that conclusion, the Seventh Circuit also rejected the argument that failure to certify a class would cause "various inefficiencies and inequities," explaining that "the Supreme Court has repeatedly emphasized that we must rigorously enforce the

parties' agreement as they wrote it, 'even if the result is "piece-meal" litigation.'" *Id.* (quoting *Dean Witter*, 470 U.S. at 221). Instead, the *Champ* Court explained that for the court to "substitute our own notion of fairness in place of the explicit terms of [the parties'] agreement would deprive them of the benefit of their bargain just as surely as if we refused to enforce their decision to arbitrate." *Id.* at 275 (internal quotation marks omitted; alteration in original).

The *Champ* court followed the rationale underlying decisions of the Second, Fifth, Sixth, Eighth, Ninth and Eleventh Circuits.[3] The *Champ* court explained that these circuits have held that "absent an express provision in the parties' arbitration agreement, the duty to rigorously enforce arbitration agreements" according to their terms barred consolidated arbitration "even where consolidation would promote the expeditious resolution of related claims." *Id.* at 274-75. The Seventh Circuit agreed with and "adopt[ed]" the reasoning of these cases, concluding that there was "no meaningful basis to distinguish between the failure to provide for consolidated arbitration and class arbitration." *Id.* at 275; see also *Iowa Grain Co.* v. *Brown*, 171 F.3d 504, 510 (7th

[3] *See Government of U.K.* v. *Boeing Co.*, 998 F.2d 68, 74 (2d Cir. 1993) (holding that "[a] district court cannot consolidate arbitration proceedings arising from separate agreements to arbitrate, absent the parties' agreement to allow such consolidation"); *American Centennial Ins. Co.* v. *National Cas. Co.*, 951 F.2d 107, 108 (6th Cir. 1991) (holding that "a district court is without power to consolidate arbitration proceedings, over the objection of a party to the arbitration agreement, when the agreement is silent regarding consolidation"); *Baesler* v. *Continental Grain Co.*, 900 F.2d 1193, 1195 (8th Cir. 1990) (holding that "absent a provision in an arbitration agreement authorizing consolidation, a district court is without power to consolidate arbitration proceedings"); *Protective Life Ins. Corp.* v. *Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281, 282 (11th Cir. 1989) (per curiam) (holding that "'the sole question for the district court is whether there is a written agreement among the parties providing for consolidated arbitration'"); *Del E. Webb Constr.* v. *Richardson Hosp. Auth.*, 823 F.2d 145, 150 (5th Cir. 1987) (same); *Weyerhauser Co.* v. *Western Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir. 1984) (same).

Cir. 1999) (explaining that "[b]ecause arbitration is based fundamentally on an agreement between the parties, the kind of class action contemplated by Fed. R. Civ. P. 23(b) is normally unavailable in arbitration") (citations omitted); *cf. Connecticut Gen. Life Ins. Co.* v. *Sun Life Assur. Co. of Can.*, 210 F.3d 771, 774 (7th Cir. 2000) ("the court has no power to order consolidation if the parties' contract does not authorize it").

In particular, the Seventh Circuit relied on the Second Circuit's decision in *United Kingdom*. *Champ*, 55 F.3d at 275. In *United Kingdom*, the Second Circuit concluded that there was no authority to "order consolidation of arbitration proceedings arising from separate agreements to arbitrate absent the parties' agreement to allow such consolidation." *Government of U.K.* v. *Boeing Co.*, 998 F.2d 68, 69 (2d Cir. 1993). The Second Circuit based that conclusion on "recent Supreme Court case law" that it determined had "undermined [its] previous conclusion that the FAA's 'liberal purposes' and the Federal Rules of Civil Procedure allow us to consolidate arbitration proceedings absent consent." *Id.* at 71; see *id.* at 72. Specifically, the Second Circuit explained that this Court's decisions in *Volt*, *Dean Witter*, and *Moses H. Cone* confirmed that the FAA mandates the enforcement of arbitration agreements in accordance with their terms, regardless of any countervailing considerations such as the court's "'own view of speed and economy.'" *Id.* at 73.[4]

[4] *See also Glencore, Ltd.* v. *Schnitzer Steel Prods. Co.*, 189 F.3d 264, 266 (2d Cir. 1999) (applying *United Kingdom*, and the "trio of 1980's Supreme Court decisions" on which it relied, to vacate order of joint arbitration hearing); *cf. Salvano* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 647 N.E.2d 1298, 1302 (N.Y. 1995) (holding that FAA barred a trial court's use of state law to order expedited arbitration where the parties' arbitration agreement did not provide for such procedures and rejecting argument that an order to expedite was justified because the FAA "contains no provision *precluding* expedited arbitration") (emphasis added).

The Eighth Circuit follows the same reasoning as *Champ* to bar class arbitrations where the parties have not provided for them. See *Dominium Austin Partners, LLC* v. *Emerson*, 248 F.3d 720, 728 (8th Cir. 2001). In *Emerson*, the Eighth Circuit explained that "the goal of the FAA is to enforce the agreement of the parties, not to effect the most expeditious resolution of claims." *Id.* Because an arbitration agreement must be enforced "'in accordance with its terms,'" the Eighth Circuit held that the district court acted properly in "compelling appellants to submit their claims to arbitration as individuals" where their agreement made "no provision for arbitration as a class." *Id.* at 728, 729; see also *Baesler*, 900 F.2d at 1195 (holding that district court was without power to consolidate arbitration proceedings when arbitration agreements were silent on the issue); *Gammaro* v. *Thorp Consumer Discount Co.*, 828 F. Supp. 673, 674 (D. Minn. 1993) (holding that FAA required it to "give effect to the agreement of the parties," and therefore it had no authority to order class arbitration where the "arbitration agreement makes no provision for class treatment of disputes"), *appeal dismissed*, 15 F.3d 95 (8th Cir. 1994).[5]

Similarly, the Alabama Supreme Court expressly followed *Champ* in *Med Center Cars, Inc.* v. *Smith*, 727 So. 2d 9 (Ala. 1998). There, the Alabama Supreme Court applied the FAA,

[5] *See also Johnson* v. *West Suburban Bank*, 225 F.3d 366, 377 n.4 (3d Cir. 2000) (citing *Champ* for the proposition that "it appears impossible" to pursue a class action in an arbitral forum "unless the arbitration agreement contemplates such a procedure"), *cert. denied*, 531 U.S. 1145 (2001); *Howard* v. *KPMG*, 977 F. Supp. 654, 665 n.7 (S.D.N.Y. 1997) (concluding that "a plaintiff . . . who has agreed to arbitrate all claims arising out of her employment may not avoid arbitration by pursuing class claims. Such claims must be pursued in non-class arbitration"), *aff'd*, 173 F.3d 844 (2d Cir. 1999) (table), *available at* 1999 WL 265022; *Herrington* v. *Union Planters Bank, N.A.*, 113 F. Supp. 2d 1026, 1033-34 (S.D. Miss. 2000) (relying on *Del E. Webb*, *Champ*, and *American Centennial* to grant motion to dismiss class-action allegations and compel arbitration), *aff'd*, 265 F.3d 1059 (5th Cir. 2001) (table).

id. at 12-13, to reverse a trial court order permitting class arbitration. See *id.* at 20. The *Med Center* court concluded that "to require class-wide arbitration would alter the agreements of the parties, whose arbitration agreements do not provide for class-wide arbitration." *Id.* at 20.

Finally, other state appellate courts have concluded that class-action procedures cannot be imposed where an arbitration agreement does not provide for them. For example, in *Stein* v. *Geonerco, Inc.*, 17 P.3d 1266, 1271 (Wash. Ct. App. 2001), the Washington court relied upon *Champ* to support its decision to refuse to "compel class arbitration" where "the arbitration clause . . . is silent on class action." *Id.* In doing so, the *Stein* court noted that the "Washington Supreme Court has ruled that when an arbitration agreement is silent on consolidation, a court may not compel consolidated arbitration." *Id.* (citing *Balfour, Guthrie & Co.* v. *Commercial Metals Co.*, 607 P.2d 856, 858 (Wash. 1980)).[6]

If this case had arisen in any of these jurisdictions, there would have been no order of class-action arbitration. The arbitration agreement in this case unquestionably does not provide for class-action arbitration. As a result, the courts in these jurisdictions would have concluded that, under the FAA, they had no authority to order class-action arbitration. The outcome-determinative ruling of the court below to the contrary warrants review by this Court.

[6] *Cf. Powertel, Inc.* v. *Bexley*, 743 So. 2d 570, 573-74, 576 (Fla. Dist. Ct. App. 1999) (relying upon *Champ* to rule that, under the FAA, court has no authority to compel class-action arbitration where the agreement did not provide for class arbitration).

B. Courts Applying The Minority Approach, Including The Court Below, Have Held That The FAA Permits Discretionary Judgments To Justify Class-Wide Or Consolidated Arbitration Even When An Arbitration Agreement Does Not Provide For Such Procedures.

As the Supreme Court of South Carolina acknowledged, there are "two different approaches" on the question presented here. Pet. App. at 11a. The court below expressly rejected the *Champ* line of cases, and instead adopted the minority position of the state courts in California and Pennsylvania (as supported by the First Circuit). Those courts hold that even if the parties to an arbitration agreement have not provided for class arbitration, the FAA does not prohibit such procedures from being superimposed on an arbitration agreement as a matter of "discretion." *Id.* at 15a.

In the decision below, the Supreme Court of South Carolina criticized *Champ* and *United Kingdom* for making "strict enforcement of the terms of the agreement" the paramount policy under the FAA. Pet. App. 13a. Instead of implementing the parties' intentions as expressed in the terms of their agreement, the court adopted precisely the reasoning that *Champ*, *United Kingdom*, *Med Center*, and other courts expressly have rejected. It held that, faced with an arbitration agreement that is "silent" regarding class arbitrations, class arbitration could be ordered, as a matter of discretion, if doing so "would serve efficiency and equity, and would not result in prejudice." *Id.* at 22a. Although the class members in each of these arbitrations were awarded at least $5,000, plus attorneys' fees, the court below expressed concern that, under the majority position, "parties with nominal individual claims, but significant collective claims, would be left with no avenue for relief," and that arbitrating numerous identical cases in multiple arbitrations would not "serve the interest of judicial economy." *Id.*

The ruling of the court below is built directly and expressly on "the approach taken by the California courts," Pet. App. 22a, particularly *Keating* v. *Superior Court*, 645 P.2d 1192 (1982), and *Blue Cross of California* v. *Superior Court*, 67 Cal. App. 4th 42 (1998). In *Keating*, the California Supreme Court held, in a case under the FAA, that state law permitted a court to order class arbitration even where an arbitration agreement did not provide for it. 645 P.2d at 1209-10. The California Supreme Court acknowledged that "a judicially ordered classwide arbitration would entail a greater degree of judicial involvement than is normally associated with arbitration." *Id.* at 1209 (explaining that court "would have to make initial determinations regarding certification and notice to the class, and . . . . to exercise a measure of external supervision in order to safeguard the rights of absent class members to adequate representation"). Nevertheless, the California Supreme Court concluded that the availability of class arbitration must be determined not based solely with regard to the parties' intent, but rather on an analysis of which procedure offers "a better, more efficient, and fairer solution." *Id.*

California appellate courts have built upon the analysis in *Keating* to hold that the FAA does not prohibit class-action procedures from being superimposed on an arbitration agreement that does not provide for class-wide arbitration. Specifically, the court in *Blue Cross* squarely held that the FAA does not "preempt[] California decisional authority authorizing classwide arbitration." 67 Cal. App. 4th at 46. The *Blue Cross* court rejected the majority position, concluding that if an order of class arbitration would not expressly contradict any terms of the arbitration agreement, a court was free to issue such an order under state law authorizing it. See *id.* at 60, 65. Whether to do so was a question for the discretion of the trial court. *Id.* at 64. The *Blue Cross* court concluded that the purpose of the FAA was simply "to abolish antiarbitration laws and to make

agreements to arbitrate specifically enforceable." *Id.* at 63. Because imposition of class-wide arbitration did not *prevent* arbitration, the court in *Blue Cross* reasoned that this approach did not violate this narrow goal of the FAA and therefore was not pre-empted. *Id.* at 64 ("[E]ven if a conflict exists between the AAA rules and classwide arbitration, the trial court may resolve the conflict. It is unlikely the AAA would refuse to abide by a court order for classwide arbitration.") (citations omitted). Indeed, the *Blue Cross* court thought its rule furthered the purpose of the FAA because it would "facilitate the enforcement of arbitration agreements by making classwide arbitration available in appropriate cases." *Id.* at 65.

The *Blue Cross* court, in rejecting *Champ* and the numerous federal circuit courts and state courts that prohibit class-action and consolidated arbitrations absent an agreement by the parties, instead followed the First Circuit's decision in *New England Energy Inc.* v. *Keystone Shipping Co.*, 855 F.2d 1 (1st Cir. 1988). See *Blue Cross*, 67 Cal. App. 4th at 58-60. In *New England Energy*, the First Circuit held that consolidated arbitration is permissible even where the arbitration agreement does not provide for consolidation, so long as a state law authorizes it. 855 F.2d at 3. In the First Circuit's view, the question was not whether the parties had agreed or consented to arbitration, but instead was whether consolidation was proper under the considerations required by state law. *Id.* at 7. Unless consolidation would "contradict[ ] the contractual terms," *id.* at 5, the FAA did not pre-empt a state law authorizing it, regardless of the parties' intent. The court reasoned that so long as a court order did not actually "divert a case from arbitration to court," it did not violate the FAA's purpose of ensuring that parties who agree to arbitration get an arbitration. *Id.* at 6-7. Within that minimal restriction, the First Circuit concluded that States were free to impose procedures as they saw fit: "We fail to see why a state should be prevented from enhancing the efficiency of

the arbitral process, so long as the state procedure does not directly conflict with a contractual provision." *Id.* at 7.

Finally, *Dickler* v. *Shearson Lehman Hutton, Inc.*, 596 A.2d 860 (Pa. Super. Ct. 1991), *appeal denied*, 616 A.2d 984 (Pa. 1992), also adopted the minority position. There, the appellate court held that a putative class-action litigation could be maintained as a class arbitration. *Id.* at 862. The court acknowledged that the FAA provided the applicable "standard for enforcing an arbitration agreement," *id.*, including the duty to enforce the parties' intentions, *id.* at 862-63, but it noted that the United States Supreme Court had not addressed the permissibility of "superimposing class-action procedures on the contract arbitration." *Id.* at 865. Like the other courts adopting the minority position, the Pennsylvania court did not limit itself to determining and applying the parties' intentions but rather invoked "the dual interest" of not only "respecting and advancing contractually agreed upon arbitration agreements," but also concerns of judicial efficiency and economy. *Id.* at 867.

C. This Case Presents An Appropriate Vehicle For Resolving This Conflict Among The Federal And State Courts.

This case presents a perfect vehicle for resolving the question whether class-action procedures may be superimposed upon an agreement that does not provide for class-action arbitration. The court below concluded that the arbitration agreements in the *Lackey* and *Bazzle* proceedings were "*silent* regarding class-wide arbitration," Pet. App. 19a, and recognized the conflicting lines of cases, *id.* It then expressly held that it would "adopt the approach taken by the California courts in *Keating* and *Blue Cross*, and hold that class-wide arbitration may be ordered when the arbitration agreement is silent *if it would serve efficiency and equity, and would not result in prejudice.*" *Id.* at 22a (emphasis added). That decision was essential to the holding below because there can be no question that the arbitral awards in this case

could not have been affirmed if the Supreme Court of South Carolina had followed the *Champ* line of cases and thus concluded that class-action arbitration cannot be imposed where an arbitration agreement is silent.

Nor can the court below avoid this Court's review by suggesting that it relied upon "independent state grounds to permit class-wide arbitration." Pet. App. 20a. That suggestion simply ignores that the issue in this case is whether the FAA preempts the South Carolina Supreme Court's application of state law. Put another way, this case presents the issue whether the FAA preempts state-law that might allow class-action procedures to be imposed on an arbitration agreement that does not provide for them. See *Volt*, 489 U.S. at 473 & n.4 (explaining that question whether FAA preempts state law is a federal question).[7] Indeed, this is a particularly good vehicle for resolving that dispute because, as the Supreme Court of South Carolina acknowledged, the arbitration agreement, by its terms, was governed by the FAA. Pet. App. 11a & n.9; compare *Dominium Partners*, 248 F.3d at 729 n.9 ("The construction of an agreement to arbitrate is governed by the FAA unless the agreement expressly provides that state law should govern."), with *Volt*, 489 U.S. at 479 ("Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA . . . .").

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[7] *See Volt*, 489 U.S. at 475-76 (reviewing whether state-court interpretation of contract subject to FAA was consistent with the "federal policy" embodied in the FAA of "enforceability, according to their terms, of private agreements to arbitrate"); *id.* at 489 U.S. at 473 n. 4 (holding that question whether state court's "interpretation of the contract" "conflicted with the FAA" conferred jurisdiction under 28 U.S.C. § 1257); *cf. Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987) (state law "that takes its meaning from the fact that a contract to arbitrate is at issue" is pre-empted by § 2 of FAA); *Doctor's Assocs.*, 517 U.S. at 685 (same).

Moreover, the court's own reasoning confirms that this case squarely presents a significant *federal* question. In reaching its decision, the court plainly did not conclude that the parties, through their agreement to arbitrate, actually intended to permit class-action arbitration. Instead, the Supreme Court of South Carolina relied upon its prior decisions that held that "a state court may order *consolidation* of claims subject to mandatory arbitration *without any contractual or statutory directive to do so*." Pet. App. 21a (second emphasis added).[8] The court below reasoned that because these prior decisions permit consolidation of claims "where the arbitration agreement is silent"—*i.e.*, where there is no "contractual . . . directive to do so"—it also "would permit class-wide arbitration, as ordering class-wide arbitration calls for considerably less *intrusion upon the contractual aspects of the relationship*." *Id.* (internal quotation marks omitted; emphasis added). In doing so, the court below explained that this "intrusion upon the contractual aspects of the relationship" was justified as a matter of state law "if it would serve efficiency and equity, and would not result in prejudice." *Id.* at 21a, 22a (internal quotation marks omitted).

But that is precisely the reasoning and analysis that was rejected by decisions such as *Champ* when they held that to "substitute our own notion of fairness in place of the explicit terms of [the parties'] agreement would deprive them of the

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[8] Specifically, the court's reliance on *Episcopal Housing Corp.* v. *Federal Ins. Co.*, 255 S.E.2d 451 (S.C. 1979), confirms that this case directly implicates this substantial judicial conflict. In *Episcopal Housing*, the Supreme Court of South Carolina relied upon the Second Circuit's decision in *Compania Espanola de Petroleos, S.A.* v. *Nereus Shipping, S.A.*, 527 F.2d 966, 975 (2d Cir. 1975) ("*Nereus*"), to hold that consolidated arbitration may be ordered even if the arbitration agreement does not provide for consolidation. 255 S.E.2d at 451. But, as shown in Part I.A, *supra*., the Second Circuit has since held that its prior decision in *Nereus* has been "undermined" by "recent Supreme Court case law" and on the issue presented here "is no longer good law." *United Kingdom*, 998 F.2d at 71.

benefit of their bargain just as surely as if we refused to enforce their decision to arbitrate." 55 F.3d at 275 (internal quotation marks omitted; alteration in original); see also *supra* at 16 n.3 (collecting cases). In this regard, the South Carolina Supreme Court's reasoning and holding cannot be reconciled with the decisions of this Court which provide that the FAA leaves no room for judicial discretion in enforcement of agreements to arbitrate. See *Dean Witter*, 470 U.S. at 218-21; see *First Options*, 514 U.S. at 947; *Moses H. Cone*, 460 U.S. at 20.[9]

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There is a well developed and persistent conflict among the federal courts of appeals and state courts regarding the requirements of the FAA. On the one hand, the *Champ* line of cases makes clear that class-actions and consolidation cannot be imposed upon an arbitration agreement that does not expressly provide for them. Instead, these courts make clear that the FAA requires such agreements to be enforced rigorously in accordance with their terms. On the other hand, the *Keating* and *Blue Cross* line of cases (and the decision in this case) hold that the FAA requires only that arbitration agreements be enforced, but does not prohibit class-action or consolidation if such a process would, in the court's view, enhance the efficiency and economy of the arbitration. The decision below squarely presents this conflict, and it provides an ideal candidate for resolving this dispute among the lower federal courts and state courts.

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[9] The Supreme Court of South Carolina simply was wrong in suggesting that a trial court's decision whether, and how, to enforce an arbitration agreement is "within the court's discretion." Pet. App. 22a. This Court's decision in *Dean Witter* explained that the FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which the arbitration agreement has been signed." 470 U.S. at 218.

II. THE ISSUE WHETHER THE FEDERAL ARBITRATION ACT PERMITS CLASS-ACTION PROCEDURES TO BE IMPOSED ON A "SILENT" ARBITRATION AGREEMENT PRESENTS AN IMPORTANT AND RECURRING ISSUE THAT WARRANTS THIS COURT'S REVIEW.

The question presented here is one of great practical importance. The division of authority has created great uncertainty for parties subject to arbitration agreements. Indeed, as the court below recognized, arbitration agreements often appear in form contracts that are employed or apply in more than one State. As a result, a uniform national rule is essential to ensure that similar cases are resolved in the same way regardless of where the parties reside. Indeed, even cases that have adopted the minority approach recognize that the FAA is designed to "prevent state and federal courts from reaching different results about the validity and enforceability of arbitration agreements in similar cases." *Blue Cross*, 67 Cal. App. 4th at 52.

In addition to the decisions discussed above that have expressly recognized this conflict, other courts have recognized and acknowledged this division of authority and its importance. For example, the Wisconsin Court of Appeals recently certified to its Supreme Court the question of class arbitration under the FAA, noting that "other state and federal jurisdictions have come to opposite conclusions" and that the question is of "substantial importance." *Eastman* v. *Conseco Fin. Servicing Corp.*, No. 01-1743, 2002 WL 1061856, at *3, *4 (Wis. Ct. App., May 29, 2002). Commentators agree that the availability of class-action and consolidated arbitration is "the subject of much litigation." Timothy J. Heinsz, *The Revised Uniform Arbitration Act: Modernizing, Revising, & Clarifying Arbitration Law*, 2001, J. Disp. Resol. 1, 15 (noting that issue of "class-action arbitration[]" is "hotly debated"); see also Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. Ill. L. Rev. 695, 711 nn.128,

129 (noting conflict among courts on availability of class-action arbitration and consolidated arbitration).

The importance of a uniform rule is magnified given the division of authority between forums in the same jurisdiction such as Pennsylvania and California. Pennsylvania state courts, relying on *Dickler*, permit class arbitration in the same circumstances in which Pennsylvania federal courts, relying on the Third Circuit's decision in *Johnson*, would prohibit it. Similarly, California state courts will permit both consolidated and class arbitration in the same circumstances in which California federal courts, following the Ninth Circuit's decision in *Weyerhauser*, would prohibit it. Indeed, although *Weyerhauser* involved consolidated arbitration, federal district courts in California rely on that case, *Champ*, and other cases in the majority to reject class-wide arbitration in circumstances where California state courts might permit it.[10]

This conflict is precisely what this Court sought to avoid in *Southland* because a lack of uniformity, particularly within the same State, "would encourage and reward forum shopping." 465 U.S. at 15. The Court rightly was "unwilling to attribute to Congress the intent, in drawing on the comprehensive powers of the Commerce Clause, to create a right to enforce an arbitration contract and yet make that right dependent for its enforcement on the particular forum in which it is asserted." *Id.* For the same reason, review is necessary here.

Furthermore, the question presented implicates a broader, and equally critical, question whether it is permissible, absent the parties' expressed intent, to impose various procedures onto arbitration proceedings. The courts that have adopted

[10] *See Bischoff* v. *DirecTV, Inc.*, 180 F. Supp. 2d 1097, 1108-09 (C.D. Cal. 2002); *Gray* v. *Conseco, Inc.*, No. SACV000322, 2001 WL 1081347, at *2-*3 (C.D. Cal., Sept. 6, 2001); *McCarthy* v. *Providential Corp.*, No. C 94-0627 FMS, 1994 WL 387852, at *8 (N.D. Cal., July 19, 1994).

the minority view hold that, in the interests of judicial economy and efficiency, various procedures may be imposed upon the parties' agreement to arbitrate so long as those procedures do not *directly conflict* with the arbitration agreement. This rule not only grants virtually free reign to tread on parties' intentions but also, as a result, impairs the ability of parties to enter into workable arbitration agreements, by requiring them to become voluminous to preclude every imaginable supplement. Indeed, the First Circuit in *New England Energy* reasoned that *any* procedures could be imposed on an arbitration agreement so long as they preserved the ill-defined "informal operational procedures" that, in that court's view, are the only goal of private arbitration. 855 F.2d at 6 n.5.

This Court has repeatedly acknowledged that the FAA's requirement that arbitration agreements be enforced according to their terms is at the core of the FAA. *Volt* itself is a prime example of the Court applying this core FAA requirement in reviewing a decision of the California Court of Appeal. Specifically, the Court in *Volt* explained that ensuring enforcement of arbitration agreements according to their terms was the "federal policy" of the FAA, 489 U.S. at 476, "Congress' principal purpose" in enacting the FAA, *id.* at 478, and "the FAA's primary purpose," *id.* at 479. Similarly, in *Doctor's Associates, Inc.* v. *Casarotto*, the Court reviewed a decision of the Montana Supreme Court and stated that "the very purpose of the Act was to 'ensur[e] that private agreements to arbitrate are enforced according to their terms.'" 517 U.S. 681, 688 (1996) (alterations in original) (quoting *Volt*, 489 U.S. at 479). See also *Mastrobuono*, 514 U.S. at 53-54 ("[T]he central purpose" of the FAA is "to ensure 'that private agreements to arbitrate are enforced according to their terms'") (quoting *Volt*, 489 U.S. at 479); *accord id.* at 57; *First Options*, 514 U.S. at 947 (same).[11]

[11] Because the parties' agreement in this case, by its terms, provided that it would be governed by the FAA, the Court need not determine

In short, there can be no doubt that the decision below presents a critical issue of great practical importance under the FAA, and that the acknowledged division on that question warrants further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 23, 2002

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whether the substantive law reflected most clearly in § 4 of the FAA, 9 U.S.C. § 4, would apply by force of law to state courts. *Cf.* Pet. App. 19a-20a. In any event, as discussed above, this Court's cases make clear that the obligation to enforce arbitration agreements in accordance with their terms is a core aspect of the FAA that applies in cases filed in both federal and state court.

APPENDICES

APPENDIX A

SUPREME COURT OF SOUTH CAROLINA

Opinion No. 25523

LYNN W. BAZZLE AND BURT A. BAZZLE,
in a representative capacity on behalf of a class and for
all others similarly situated,
Respondents,

v.

GREEN TREE FINANCIAL CORP. A/K/A GREEN TREE ACCEPTANCE CORPORATION A/K/A GREEN TREE FINANCIAL SERVICES CORPORATION N/K/A CONSECO FINANCE, INC.,
Appellant.

DANIEL B. LACKEY, GEORGE BUGGS, AND FLORINE BUGGS,
in a representative capacity on behalf of a class and for
all others similarly situated,
Respondents,

v.

GREEN TREE FINANCIAL CORP., A/K/A GREEN TREE FINANCIAL SERVICES CORP., A/K/A GREEN TREE ACCEPTANCE CORP., N/K/A CONSECO FINANCE, INC.,
Appellant.

Heard March 21, 2002,
Filed August 26, 2002

JUDGES: CHIEF JUSTICE TOAL. MOORE, WALLER, BURNETT, JJ., and Acting Justice George T. Gregory, Jr., concur.

OPINION

CHIEF JUSTICE TOAL: Two classes of plaintiffs, represented by Lynn and Burt Bazzle, et. al. ("Bazzles") and by Daniel Lackey, et. al. ("Lackey"), were awarded damages pursuant to their respective class action arbitrations against Green Tree Financial Corporation ("Green Tree") for violations of the South Carolina Consumer Protection Code.[1] Green Tree appeals the arbitrator's [2] awards in both cases, on grounds that class-wide arbitration of the plaintiffs' claims was not authorized by the arbitration agreement.

FACTUAL/PROCEDURAL BACKGROUND

On February 22, 2001, this Court entered an Order withdrawing Green Tree's appeal from the Court of Appeals. By that order, this Court assumed jurisdiction and consolidated the *Bazzle* and *Lackey* cases for appeal. Although each case proceeded through arbitration independently, resolution of each appeal involves the same novel issue: whether class-wide arbitration is permissible when the arbitration agreement between the parties is silent regarding class actions.

Bazzle

The Bazzles (like their fellow class members) were approached by Patton General Contracting ("Patton"), a non-exclusive Green Tree dealer, in 1995, to perform home improvements. Patton provided the Bazzles with a Green Tree application for financing. The Green Tree application contained no attorney or insurance agent preference notice. On May 20, 1995, the Bazzles executed a Retail Installment Contract and Security Agreement for $15,000 which

[1] S.C. Code Ann. §§ 37-10-102; 37-10-105 (Supp. 1997).

[2] The same arbitrator heard both cases separately.

contained the arbitration clause at issue.[3] The same day the Bazzles executed a number of other documents identifying Green Tree as the lender, including a mortgage stamped with directions to return it to Green Tree once executed. The Bazzles were never given an attorney or insurance preference form and no attorney was involved in the transaction or closing on their behalf.

On March 25, 1997, Lynn and Burt Bazzle commenced an action against Green Tree in the Dorchester County Court of Common Pleas based on Green Tree's alleged violations of the attorney and insurance agent preference provisions of the South Carolina Consumer Protection Code [4] arising out of their home improvement financing agreement with Green Tree.

On April 21, 1997, the Bazzles filed an amended complaint incorporating class allegations and a Motion for Class Certification. A month later, Green Tree filed a Motion for Stay and to Compel Arbitration. On December 5, 1997, the trial court heard both motions. It granted the Motion for Class Certification. After the court granted class certification, Green Tree pursued its Motion to Compel Arbitration, and the trial court granted it.

The trial court issued two separate orders memorializing its rulings on December 5, 1997: (1) an order granting class certification; and (2) an order compelling arbitration. In its order compelling arbitration, the trial court stated that the order applied to the Bazzles and all members of their class

[3] The arbitration clause does not mention class actions in arbitration or otherwise, but Green Tree argues the singular language of the clause stating claims relating to "*this* contract . . . will be resolved by binding arbitration by an arbitrator selected by us with the consent of *you*" precludes class-wide arbitration. (emphasis added). Green Tree does not concede that the agreement is "silent."

[4] S.C. Code Ann. §§ 37-10-102; 37-10-105 (Supp. 1997).

who elected to be part of the action. In a supplemental order issued January 7, 1998, the trial court ordered that the class action in arbitration proceed on an opt-out basis.

On January 20, 1998, Green Tree filed a Motion for Reconsideration of the trial court's order granting class certification. After a hearing, the trial court denied Green Tree's Motion for Reconsideration, and Green Tree filed an appeal. On April 28, 1998, the Court of Appeals dismissed Green Tree's appeal on grounds that granting or denying class certification is interlocutory and non-appealable. Green Tree filed a Petition for Rehearing. The Court of Appeals denied rehearing and Green Tree filed a petition for certiorari with this Court. This Court denied Green Tree's petition and remitted the case to the trial court.

On February 24, 1999, the Bazzles filed a Motion to Compel Appointment of an Arbitrator. On May 6, 1999, Green Tree filed a Motion to Dismiss on grounds that the Bazzles were not the proper parties to pursue the claims asserted, as their interests were contrary to the interests of the class members. On May 20, 1999, the trial court heard both motions. The trial court appointed the Honorable Thomas Ervin as arbitrator and declined to hear the Motion to Dismiss for lack of jurisdiction.

All class action proceedings were thereafter administered by the arbitrator, without further involvement of the trial court. The arbitrator handled several motions by the parties before holding the final hearing on May 31, 2000. On July 24, 2000, the arbitrator issued a Final Order and Award, finding Green Tree liable for violating the attorney and insurance preference statute, S.C. Code Ann. § 37-10-102(a). The arbitrator found the remedies for such a violation to be in S.C. Code Ann. § 37-10-105 (Supp. 1996 & 1997) and awarded relief to the class of 1,899 individuals in the amount of $10,935,000, and an additional $3,645,500 in attorney's fees and $18,242 in costs.

On July 25, 2000, the Bazzles filed a Motion to Confirm the Award in the trial court. On August 24, 2000, Green Tree filed a Motion to Remand the Award for Amendment and Clarification, an objection to the Motion to Confirm, and a Motion to Vacate the Award. On September 15, 2000, the trial court confirmed the award and denied Green Tree's motions to remand and vacate. Green Tree appealed and this Court assumed jurisdiction to hear the consolidated appeals.

Lackey

Daniel Lackey (and his fellow class members) entered into preprinted consumer installment contracts and security agreements with Green Tree for the purchase of mobile homes. These transactions were secured by real property and were subject to the South Carolina Consumer Protection Code. In each of these transactions, the consumer completed a Green Tree application for financing through a Green Tree dealer. The applications contained no attorney or insurance preference notice and no preference form was provided at any other time during the transaction.

Green Tree, not its dealers, notified the consumer whether credit had been granted or denied. If granted, Green Tree set the terms, including the interest rate, and prepared a mortgage and note. The mortgages were delivered to the consumer through the dealer, but were returned directly to Green Tree. The notes and mortgages were assigned to Green Tree. Green Tree funded the transaction after the consumer reported satisfaction with the set up of the mobile home and then issued checks to the dealer.

On May 28, 1996, Daniel Lackey and George and Florine Buggs commenced a *class* action against Green Tree in the Barnwell County Court of Common Pleas. The Lackey plaintiffs, like the Bazzles, alleged violations of the attorney and insurance preference provisions of the South Carolina Consumer Protection Code.

Green Tree filed its answer and the Lackey plaintiffs proceeded to file a Motion for Class Certification. Green Tree moved to Stay the Matter and to Compel Arbitration. The trial court denied Green Tree's Motion to Compel Arbitration, finding Green Tree's contract was an adhesion contract with an unconscionable and unenforceable arbitration clause. Green Tree appealed and the Court of Appeals reversed. Although the Court of Appeals agreed that the contracts were ones of adhesion, it found that the arbitration clause within them was not unconscionable. *Lackey, et. al. v. Green Tree Fin. Corp.*, 330 S.C. 388, 498 S.E.2d 898 (Ct. App. 1998).

Following remand, the parties entered into a Consent Order appointing the Honorable Thomas Ervin as arbitrator. Apparently, the arbitrator raised the issue of class action arbitration and held a hearing to determine whether a class action could proceed under Green Tree's arbitration clause.[5] The Lackey Plaintiffs claim Green Tree sought a decision by the arbitrator at the hearing that the class action could not proceed in arbitration. Green Tree, however, claims its involvement was limited to vigorous objection that the arbitrator did not have authority to order class arbitration under the Federal Arbitration Act[6] ("FAA") and the arbitration agreement. After a hearing on the matter, the arbitrator issued an order permitting class action arbitration and scheduled a class certification hearing.

On September 22, 1998, Green Tree initiated a declaratory judgment action in federal district court, seeking to enjoin the

[5] Although the Lackey plaintiffs moved for class certification in the trial court before Green Tree moved to compel arbitration, the trial court never addressed the motion because it refused to compel arbitration. As discussed, its decision was reversed and the matter was remanded for arbitration before the motion to certify the class was ever considered.

[6] 9 U.S.C. §§ 1-208 (1994).

arbitrator from certifying a class. After a hearing, the district court denied the injunction and dismissed the declaratory judgment action for lack of subject matter jurisdiction.[7]

On November 28, 1998, the arbitrator held the hearing on class certification. Green Tree's counsel was present but refused to participate in the argument of the motion. The arbitrator found the requirements for class certification were met. In December 1998, Green Tree filed an action for Declaratory Judgment and Preliminary Injunction in state court and a Motion to Stay the arbitration proceedings. After a hearing, the trial court denied the stay on the ground it lacked jurisdiction to interfere with the arbitration.[8]

After a hearing in May of 1999, the arbitrator approved a class notice that was sent to the class members on May 12, 1999. On January 28, 2000, the arbitrator held a pre-trial conference. At the conference, the parties entered into a Consent Agreement redefining the Lackey class to include all mobile home transactions and placing all home improvement class members in the Bazzle class.

The arbitrator heard the Lackey claims on March 6-8, 2000. Green Tree participated, offering witnesses and evidence. At the conclusion, the arbitrator ruled orally that Green Tree had violated the attorney and insurance agent preference requirements of the Consumer Protection Code. The arbitrator awarded $9,200,000 for violation of the attorney and insurance preference statute, and an additional $3,066,666 in attorney's fees and $18,252 in costs. On May 31, 2000, the same arbitrator heard the Bazzle home

[7] Significantly, the district court noted that even if it had jurisdiction, it would decline to intervene in the proceeding before the arbitrator as section 4 of the FAA only authorizes a party to petition a federal court when it has been aggrieved by the refusal of another to arbitrate.

[8] The trial court noted in its order that it found class actions and arbitration to be compatible.

improvement claims and again held Green Tree violated the attorney and insurance preference provisions. At this hearing, the arbitrator established the procedures for Green Tree to address its offset claims in both *Bazzle* and *Lackey*.

On July 24, 2001, the Lackey Plaintiffs filed a motion to confirm the award in trial court. In response, Green Tree filed a Motion to Remand and a Motion to Vacate the award. In December 2001, the trial court confirmed the award. Green Tree appealed and this Court withdrew the appeal from the Court of Appeals and assumed jurisdiction to hear the consolidated *Bazzle* and *Lackey* appeals.

Although the *Bazzle* and *Lackey* cases involve financing for different purposes, Green Tree structured and conducted the transactions in the same manner. The consumers in both classes were bound to arbitration by the same clause which appeared in their Retail Sales Agreements. Procedurally, however, the two cases differ in how class certification was granted. As discussed, in *Bazzle*, the trial court certified the class and then granted Green Tree's Motion to Compel Arbitration. The Lackey suit was filed as a class action in trial court, but arbitration was compelled before the motion to certify the class was considered although the Lackey plaintiffs did make a Motion to Certify the Class. Thus, the arbitrator authorized class certification within the arbitration. The cases have been consolidated and Green Tree appeals the following issues:

I. Did Green Tree waive its ability to object to class-wide arbitration in *Bazzle* and *Lackey* by manifesting consent to the class-wide arbitration?

II. Did the trial court in *Bazzle* and the arbitrator in *Lackey* have contractual or legal authority to authorize the respective arbitrations to proceed on a class action basis?

III. If so, were the due process rights of the absent class members sufficiently protected?

LAW/ANALYSIS

I. Waiver

The Bazzle and Lackey plaintiffs argue this Court can avoid addressing the broad issue of whether class-wide arbitrations were permissible by affirming on the alternate ground that Green Tree manifested consent to class-wide arbitration and may not now object to it. We are not convinced by this waiver argument.

The courts of this state have recognized that a party cannot complain when it receives the relief for which it has asked. *See McKissick v. J.F. Cleckley & Company*, 325 S.C. 327, 479 S.E.2d 67 (Ct. App. 1996); *Estes v. Gray*, 319 S.C. 551, 462 S.E.2d 561 (Ct. App. 1995). Specifically, a party that by its conduct consents to arbitration of a dispute waives any subsequent judicial challenge to its arbitrability. *See Rock-Tenn Co. v. United Paperworkers Int'l Union*, 184 F.3d 330 (4th Cir. 1999). Although this is an accurate statement of the law, Green Tree did not consent to class-wide arbitration by defending itself in the arbitration. As discussed, Green Tree protested class-wide arbitration vigorously in both cases, receiving adverse rulings every time, before defending itself on the merits.

In *Bazzle*, Green Tree requested arbitration and received it after the motion to certify the class was granted by the trial court. Even after the trial court certified the *Bazzle* class, Green Tree continued to push for arbitration, and the trial court granted Green Tree's Motion to Compel arbitration. The Bazzles therefore contend that Green Tree got what it asked for and cannot now complain that the court abused its discretion by granting the relief it requested. Although Green Tree did object to the class-wide arbitration before the arbitrator, the Bazzles contend it waived its ability to object by

manifesting consent to proceed through some of its subsequent actions. For example, the Bazzles point to Green Tree's Motion to Decertify the class before the arbitrator on substantive grounds as evidence that Green Tree manifested consent to the arbitrator's authority to certify or decertify the class. The Bazzles claim that by placing the decertification issue squarely before the arbitrator, Green Tree manifested acceptance of the arbitral forum as sufficient to resolve the issue.

In *Lackey*, the plaintiffs argue similarly that Green Tree waived its right to object to class-wide arbitration by moving to compel arbitration when it knew of the class allegations being asserted. They argue that moving to compel arbitration without insisting that the trial court address the class certification motion manifested consent for the arbitrator to decide the certification issue. The Lackey plaintiffs assert that Green Tree did not object with motions and stays until after the arbitrator ruled against Green Tree on the general issue of whether this action could possibly proceed as a class-wide arbitration. The Lackey plaintiffs claim Green Tree was obligated to force the trial court to decide the Lackey plaintiffs' motion before it granted Green Tree's Motion to Compel because Green Tree was aware of the class allegations and knew the arbitrator would decide the issue if the trial court did not.

We are not persuaded by the plaintiffs arguments for waiver in *Bazzle* or *Lackey*. In *Bazzle*, Green Tree argued against the Motion to Certify before the trial court, lost, and then filed a Motion for Reconsideration of the issue. The Motion for Reconsideration was denied and Green Tree appealed the denial all the way to this Court. In *Lackey*, although Green Tree did not insist the trial court decide the issue before arbitration was compelled, it objected vigorously to the possibility of class certification at the first hearing on the matter before the arbitrator and filed actions to enjoin class certification in federal and state court. Green Tree's

motions in both cases were entirely unsuccessful, but, nonetheless, manifested Green Tree's objection to class-wide arbitration sufficiently to counter the plaintiffs' waiver argument.

II. Class Action Arbitration

In these consolidated cases, Green Tree argues the trial court and the arbitrator failed to enforce Green Tree's arbitration clause in accordance with its terms, in violation of the FAA, when they imposed class-wide arbitration.

The parties do not dispute that the FAA applies to the arbitration agreements in both cases.[9] The arbitration agreements expressly state that they are made pursuant to transactions in interstate commerce and are governed by the FAA. Although they agree the FAA applies, the parties dispute how the FAA impacts the class-wide arbitration question.

The United States Supreme Court has not addressed the FAA's impact on class-wide arbitration, although it was presented with an opportunity to do so in *Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984).[10] Thus, there is no binding precedent that this Court is obligated follow [sic]. Courts in other jurisdictions have addressed the issue, and have taken two different approaches. Several federal circuits have precluded class-wide arbitration when the arbitration agreement is silent based on their

---

[9] In a separate action against Green Tree, this Court previously held Green Tree's arbitration clause was governed by the FAA. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360 (2001). The same arbitration clause is at issue here.

[10] This was an appeal from an opinion of the California Supreme Court in which, among other things, the California Court held class-wide arbitration permissible under state law when the arbitration agreement was silent regarding class action arbitration. *Keating v. Superior Court*, 31 Cal.3d 584, 645 P.2d 1192, 183 Cal. Rptr. 360 (Cal. 1982).

interpretation of section 4 of the FAA.[11] Representing the opposing view, the California courts have permitted class-wide arbitration on a case by case basis when the arbitration agreement is silent.[12]

A. Seventh Circuit Approach

Green Tree urges the Court to adopt the reasoning employed by the Seventh Circuit, holding courts lack authority to order class-wide arbitration under section 4 of the FAA. 9 U.S.C. § 4. Section 4 requires arbitration in "accordance with the terms" of the agreement. If the arbitration agreement in question is silent on the issue, these courts reason that authorizing class-wide arbitration would not be in "accordance with the terms" of the agreement. *See Champ v. Siegel Trading Co., Inc.; McCarthy v. Providential Corp., et. al.*, 1994 WL 387852 (N.D. Cal.); *Gammaro v. Thorp Consumer Discount Co.*, 828 F.Supp. 673 (D. Minn. 1993). These courts support their decisions by drawing an analogy between ordering *class-wide* arbitration and ordering *consolidation* in arbitration.[13] *Id.*; *Med Ctr. Cars, Inc. v. Smith*, 727 So.2d 6 (Ala. 1998) (finding the federal authority persuasive and applying the consolidation analogy to class-wide arbitration in Alabama state courts).

In *Champ*, a class action alleging violations of the Commodity Exchange Act, RICO, and other state laws, the Seventh Circuit found "no meaningful basis to distinguish

[11] This federal approach was first enunciated by the Seventh Circuit in *Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269 (7th Cir. 1995).

[12] The California approach was first enunciated in *Keating v. Superior Court*.

[13] Several federal circuits have refused to order consolidation of arbitration when the agreement is silent regarding consolidation. *See Government of United Kingdom v. Boeing, Co.*, 998 F.2d 68 (2d Cir. 1993); *American Centennial Ins. v. National Cas. Co.*, 951 F.2d 107 (6th Cir. 1991); *Baesler v. Continental Grain Co.*, 900 F.2d 1193 (8th Cir. 1990).

between the failure to provide for consolidated arbitration and class arbitration." 55 F.3d at 275. Based on this comparison, the *Champ* court adopted "the rationale of several other circuits and [held] that section 4 of the FAA forbids federal judges from ordering class arbitration where the parties' arbitration agreement is silent on the matter." *Id.*; *Boeing; National Cas.; Baesler.* In reaching their decision in the consolidation cases, the various courts placed strict enforcement of the terms of the agreement above the policy favoring expeditious resolution of claims. *Champ*.

Citing a decision by the Second Circuit, the *Champ* court noted that the FAA's overriding goal was to place private arbitrations on the same footing as other contracts negotiated between private parties. *Champ* (citing *United Kingdom v. Boeing*, 998 F.2d 68 (2d Cir. 1993)). In furtherance of this goal, the Second Circuit held the duty to enforce the agreement as the parties wrote it to be tantamount, regardless of "possible inefficiencies created by such enforcement." *Champ*, 55 F.3d at 275 (citing *Boeing*, 998 F.2d at 72). The *Champ* court, however, failed to discuss whether the arbitration agreement was one of adhesion or was truly *negotiated* by the parties, and failed to discuss the differences between consolidation and class-action on a practical level.

B. California Approach

The California Supreme Court, on the other hand, did consider whether a trial court could order class-wide arbitration under adhesive but enforceable franchise contracts in *Keating*, 31 Cal.3d 584, 645 P.2d 1192, 183 Cal. Rptr. 360, *rev'd in part on other grounds* in *Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984).[14] The Califor-

[14] The United States Supreme Court declined to reach this issue, finding that the California Supreme Court's decision was based entirely on state law and raised no federal question for them to review (e.g., whether

nia court concentrated on the negative implications of refusing to allow class-wide arbitration when arbitration has been made mandatory through an adhesion contract:

> If the right to a classwide proceeding could be automatically eliminated in relationships governed by adhesion contracts through the inclusion of a provision for arbitration, the potential for undercutting these class action principles, and for chilling the effective protection of interests common to a group, would be substantial. Arbitration proceedings may well provide certain offsetting advantages through savings of time and expense; but, depending upon the nature of the issues and the evidence to be presented, it is at least doubtful that such advantages could compensate for the unfairness inherent in forcing hundreds or perhaps thousands, [sic] of individuals asserting claims involving common issues of fact and law to litigate them in separate proceedings against a party with vastly superior resources.

Keating, 31 Cal.3d at 609.

The California Supreme Court, like the Seventh Circuit, drew an analogy between ordering consolidation and class-wide arbitration to support its decision. In 1982, when *Keating* was decided, the Second Circuit permitted consolidation where the agreement was silent. *Compania Espanola de Pet., S.A. v. Nereus Ship*, 527 F.2d 966 (2d Cir. 1975), *cert. denied* 426 U.S. 936, 96 S. Ct. 2650, 49 L. Ed. 2d 387 (1976). The Second Circuit has reversed itself on this issue since *Keating*, however, and now holds that ordering consolidation when the arbitration agreement is silent violates section 4 of the FAA. *United Kingdom v. Boeing*. Nonetheless, the California court's analysis remains viable; although it drew an analogy between permitting consolidation and class-wide arbitration

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or not the FAA prohibited class-wide arbitration in these circumstances). *Southland*, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1.

when the contract is silent, it also distinguished the two, making its case for class-wide arbitration even stronger.

The California court pointed out that consolidated arbitration often involves a "tripartite relationship in which the parties in dispute each have a contract with a third party, but not with each other," as opposed to class-wide arbitrations in which all plaintiffs had a contract directly with the defendant. *Keating*, 31 Cal.3d at 612. Highlighting the greater burden likely to result from ordering consolidation, the California court explained:

> Thus, a party may be forced into a coordinated arbitration proceeding in a dispute with a party with whom he has no agreement, before an arbitrator he had no voice in selecting and by a procedure he had not agreed to.
>
> In these respects, an order for classwide arbitration in an adhesion context would call for considerably less intrusion upon the contractual aspects of the relationship.

Id. Unlike parties subjected to consolidation, "the members of a class subject to classwide arbitration would all be parties to an agreement with the party against whom their claim is asserted." *Id.* Balancing the potential inequities and inefficiencies against resulting prejudice to the drafting party, the California court held that it was not beyond the court's authority to order class-wide arbitration in the appropriate case. The court thus left the question for the trial court to answer on a case by case basis, in its discretion, upon consideration of certain factors.[15]

More recently, the California Court of Appeal for the second district reaffirmed the California Supreme Court's holding in *Keating*. *Blue Cross v. Superior Court*, 67 Cal. App. 4th 42, 78 Cal. Rptr. 2d 779 (Cal. App. 1998), *cert.*

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[15] The factors that should be considered include efficiency, equity, and prejudice to the drafting party likely to result from class-wide arbitration. *Keating*.

denied 527 U.S. 1003, 119 S. Ct. 2338, 144 L. Ed. 2d 235 (1999). The Court of Appeal discussed the rationale employed by the California Supreme Court in *Keating* extensively, and upheld the court's ruling in *Keating* on state *and* federal law grounds. *Blue Cross.* Going further than the California Supreme Court, the Court of Appeal addressed the impact of the FAA on this issue, concluding that it does not preclude application of California's class-wide arbitration rule. *Id.*

First, the Court of Appeal held that section 4 of the FAA does not apply to state courts at all. For support, the court cited the legislative history of the FAA and several decisions of the United States Supreme Court. *Id.* (citing *Volt Info. Sciences v. Leland Stanford Jr. U.*, 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989) (stating that the Court has never held that sections 3 and 4 of the FAA apply to state courts). The Court of Appeal reasoned that the language of section 4 contemplated a petition before a district court and application of the federal rules of civil procedure. 67 Cal. App. 4th at 60 (citing *Rosenthal v. Great Western Financial Securities Corp.*, 14 Cal.4th 394, 926 P.2d 1061, 58 Cal. Rptr. 2d 875 (Cal. 1996)). The court recognized the FAA would prevail over a state procedural rule if in direct conflict, but found that a state procedure that furthers "the effectuation of the federal law's objectives" would not conflict and should be followed. 67 Cal. App. 4th at 61 (quoting *Rosenthal*, 14 Cal.4th at 410). The court concluded that following state precedent allowing class-wide arbitration can further rather than defeat the FAA's goal of enforcing agreements to arbitrate and is, therefore, not preempted by section 4 of the FAA. *Blue Cross.*[16]

[16] The court also addressed the consolidation argument and drew an analogy to consolidation despite the Second Circuit's reversal of its decision relied upon by the California Supreme Court in *Keating*. The Court of Appeal cited a decision by the First Circuit permitting consolidation where the agreement was silent, finding its reasoning to be more persuasive than those circuits (Second, Fifth, Sixth, and Eleventh) that prohibit consolidation where the agreement is silent. *Blue Cross* (citing *New England Energy Inc. v. Keystone Shipping Co.*, 855 F.2d 1 (1st Cir. 1988) *cert. denied* 489 U.S. 1077, 109 S. Ct. 1527, 103 L. Ed. 2d 832 (1989)). The Third Circuit has adopted *Champ* since *Blue Cross* was decided. *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000).

C. Relevant South Carolina Law

This Court has not considered whether or not class-wide arbitration may be ordered when the arbitration agreement is silent. Generally, however, this Court favors arbitration of disputes. *Heffner v. Destiny, Inc.*, 321 S.C. 536, 471 S.E.2d 135 (1995). Further, our courts resolve any doubts concerning the scope of arbitrable issues in favor of arbitration. *See Towles v. United Health Care Corp.*, 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999). This Court examined the arbitration clause at issue last year in *Munoz v. Green Tree Financial Corp*, 343 S.C. 531, 542 S.E.2d 360 (2001). In *Munoz*, this Court held "general principles of state law apply to arbitration clauses governed by the FAA." 343 S.C. at 539, 542 S.E.2d at 364 (2001) (citing *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996)).

Generally, if the terms of a contract are clear and unambiguous, this Court must enforce the contract according to its terms regardless of its wisdom or folly. *Ellis v. Taylor*, 316 S.C. 245, 449 S.E.2d 487 (1994). Ambiguous language in a contract, however, should be construed liberally and interpreted strongly in favor of the non-drafting party. *Myrtle Beach Lumber Co., Inc. v. Willoughby*, 276 S.C. 3, 274 S.E.2d 423 (1981). After all, the drafting party has the greater opportunity to prevent mistakes in meaning. It is responsible for any ambiguity and should be the one to suffer from its shortcomings. *Id.*

The United States Supreme Court has applied this common-law rule of contract construction, construing ambiguous language against the drafting party in a case involving arbitration issues. In *Mastrobuono v. Shearson Lehman Hutton, Inc.*, a suit brought by customers of a securities brokerage firm, the Court permitted an arbitration panel to award punitive damages although the arbitration agreement was silent regarding punitive damages, but contained a choice of law provision which the brokerage firm claimed prohibited the arbitrator from awarding punitive damages. 514 U.S. 52, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995). The Court framed the question presented in broad terms, asking whether the award of punitive damages was consistent with the FAA's purpose of ensuring arbitration agreements are "enforced according to their terms." *Mastrobuono*, 514 U.S. at 54, 115 S. Ct. at 1214, 131 L. Ed. 2d at 82. The Court found the choice of law provision introduced an ambiguity into an agreement that would otherwise permit punitive damage awards. The Court then resolved the ambiguity against the brokerage firm as the drafting party, based on the federal policy favoring arbitration[17] and the common-law rule of contract interpretation construing ambiguous language against the drafting party. *Mastronbuono.*

Although this Court has not addressed whether class-wide arbitrations are permissible when the agreement is silent, this Court has considered whether consolidation of arbitration is permissible. In *Episcopal Housing Corp. v. Federal Ins. Co.*, this Court authorized consolidation of the claims of plaintiff (owner of an apartment complex) against an architect and builder absent contractual or statutory authority. 273 S.C. 181, 255 S.E.2d 451 (1979). In sum, this Court held, "[w]hile

[17] The *Mastrobuono* Court cited its opinion in *Volt Info. Sciences v. Leland Stanford Jr. U.* for the proposition that ambiguities as to the scope of the arbitration clause should be resolved in favor of arbitration. *Volt*, 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989).

we recognize that arbitration is a creature of contract, appellant would not be denied its contracted-for right to arbitration; rather the consolidation would provide a logical, expeditious method by [w]hich to enforce that right." *Episcopal Housing*, 273 S.C. at 183-84, 255 S.E.2d at 452. Significantly, the Court considered whether the objecting parties had demonstrated any prejudice which would result from consolidated proceedings and found that they had not. *Id.* The Court of Appeals applied *Episcopal Housing's* prejudice analysis in a more recent decision, and this Court has not revisited the issue. *Plaza Development Services v. Joe Harden Builder, Inc.*, 294 S.C. 430, 365 S.E.2d 231 (Ct. App. 1988).

D. Application to *Bazzle* and *Lackey*

As a preliminary matter, we find Green Tree's arbitration clause was *silent* regarding class-wide arbitration. Certainly, the clause does not mention class-wide arbitration, but Green Tree argues that the language limits arbitration to claims by individuals. Green Tree relies on the portion of the clause providing for arbitration of "disputes, claims, or controversies arising from or relating to *this contract*, or the relationships which result from *this contract*." [18] In our opinion, this language does not limit the arbitration to non-class arbitration. At best, it creates an ambiguity, and should, therefore, be construed against the drafting party, Green Tree.

Still, Green Tree contends this Court must follow the federal precedent established by the Seventh Circuit in *Champ*. Green Tree argues that this Court is obligated to follow *Champ*, as a matter of federal substantive law, mandated by section 4 of the FAA. We disagree. The United

[18] The arbitration agreements contained in the Retail Sales Agreements in *Bazzle* and *Lackey* are identical except for one word. The *Bazzle* clause says the arbitrator will be selected by Green Tree "with the consent of *you*" and the *Lackey* clause says "with the consent of *Buyer[s]*." (Emphasis added).

States Supreme Court has not addressed this issue and the precedent set by the federal circuit courts is not binding on this Court. Although Green Tree asserts that the Fourth Circuit *recognizes* that the FAA *requires* non-class arbitration, we believe Green Tree is incorrect. The Fourth Circuit has not addressed the issue directly; the Fourth Circuit has cited *Champ*, but only in dicta, and the question of class-wide arbitration resolved in *Champ* has not been before the Fourth Circuit. *See Deiulemar Compagnia Di Navigazione S.p.A. v. M/V Allegra*, 198 F.3d 473 (4th Cir. 1999).[19]

Moreover, whether section 4 of the FAA applies in state court is debatable. Section 4 provides, "[a] party aggrieved by the alleged failure . . . of another to arbitrate under a written agreement for arbitration may petition a *United States district court* . . . ." 9 U.S.C. § 4. As noted by the California Court of Appeal in *Blue Cross*, this language contemplates enforcement in the federal district court, not state court, and the United States Supreme Court has not held that section 4 applies in state courts to counter the plain meaning of the statute. *See Volt*, 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989) (stating that the Court has never held that sections 3 and 4 of the FAA applied to state courts).

In any case, this Court can rely on independent state grounds to permit class-wide arbitration, in the trial court's discretion, where the agreement is silent. First, under general

[19] In *Deiulemar Compagnia*, the Fourth Circuit cited *Champ* in its discussion of the application of Rule 81 of the Federal Rules of Civil Procedure ("FCRP") in determining arbitrability. Specifically, the court held, "[t]he lesson of *Champ* . . . is that Rule 81(a)(3) does not affirmatively authorize application of the federal rules to matters that are incident to an arbitrable dispute." *Deiulemar Compagnia*, 198 F.3d at 483. Class-wide arbitration was not an issue in *Deiulemar Compagnia*, and this Court is still free to adopt the position that the FAA does not prohibit a state court from ordering class-wide arbitration where the agreement is silent.

principles of contract interpretation, we construe Green Tree's omission of any reference to class actions against them. "As a matter of pure contract interpretation it is striking, and rather odd, that so many courts have interpreted silence in arbitration agreements to foreclose rather than to permit arbitral class actions." [20] No case law or statute in South Carolina prohibits class-wide arbitration. To the contrary, this Court strongly favors arbitration and has held that a state court may order *consolidation* of claims subject to mandatory arbitration without any contractual or statutory directive to do so. *Episcopal Housing Corp. v. Federal Insurance Co.; Plaza Development Services v. Joe Harden Builders* (holding that a court has authority to order consolidation when it would serve to expedite the parties contracted-for right of arbitration and the parties have not demonstrated prejudice would result).

The rationale employed by *Champ* that Green Tree urges this Court to adopt is based on an analogy between ordering consolidation and class-wide arbitration where the agreement is silent. *Champ* grounds its decision to prohibit class-wide arbitration almost entirely on the precedent of other courts prohibiting consolidation of arbitration absent an explicit right to consolidate within the written agreement. Applying this precedent in South Carolina results in the opposite outcome. Since this Court permits consolidation of appropriate claims where the arbitration agreement is silent, it follows that this Court would permit class-wide arbitration, as ordering class-wide arbitration calls for "considerably less intrusion upon the contractual aspects of the relationship." 42 Wm & Mary L. Rev. 1, 86-87. As the California Court noted in *Keating*, the members of a class would be parties to an agreement with the defendant, as opposed to consolidated

[20] Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm & Mary L. Rev. 1, 83 (Oct. 2000).

parties, who each have a contract with a third party but not with each other. *Id.; Keating.*

Today, we adopt the approach taken by the California courts in *Keating* and *Blue Cross,* and hold that class-wide arbitration may be ordered when the arbitration agreement is silent if it would serve efficiency and equity, and would not result in prejudice.[21] If we enforced a mandatory, adhesive arbitration clause, but prohibited class actions in arbitration where the agreement is silent, the drafting party could effectively prevent class actions against it without having to say it was doing so in the agreement. Following the federal approach risks such a result where arbitration is mandated through an un-negotiated adhesion contract. Under those circumstances, parties with nominal individual claims, but significant collective claims, would be left with no avenue for relief and the drafting party with no check on its abuses of the law.[22] Further, hearing such claims (involving identical issues against one defendant) individually, in court or before an arbitrator, does not serve the interest of judicial economy.

In South Carolina, a trial court's ruling on whether an action is properly maintainable as a class action is within the court's discretion. *Tilley v. Pacesetter Corp.*, 333 S.C. 33, 508 S.E.2d 16 (1998). Therefore, a court's decision whether or not to certify a class is reviewed under an abuse of

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[21] Although this present case does not raise this question, we note that preclusion of class-wide or consolidated arbitration in an adhesion contract, even if explicit, undermines principles favoring expeditious and equitable case disposition absent demonstrated prejudice to the drafter of the adhesive contract.

[22] Apparently, even the courts which prohibit class-wide arbitration when the agreement is silent acknowledge that class-wide arbitration *can* be accomplished as a practical matter. *See Johnson v. West Suburban Bank*, 225 F.3d 366, 377 (3d Cir. 2000) (stating that it appears impossible for a class action to be pursued in an arbitral forum "unless the arbitration agreement contemplates such a procedure").

discretion standard. *Id.* Neither the trial court nor the reviewing court may look to the merits when determining whether to certify a class. *Id.* (citing *Curley v. Cumberland Farms Dairy*, 728 F. Supp. 1123 (D.N.J. 1990).

The permissible scope of review of arbitral decisions is far more limited. Section 10 of the FAA provides extremely limited grounds for vacating an arbitrator's award. Only where (1) the award was procured by corruption, fraud, or undue means; (2) there was evident partiality or corruption in the arbitrators; (3) the arbitrators were guilty of misconduct in refusing to postpone a hearing, or in refusing to hear pertinent evidence, or any other misconduct by which parties' rights have been prejudiced; or (4) the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. 9 U.S.C. § 10. If an arbitrator acted even *arguably* within the scope of his authority, even a *serious* error on his part does not warrant overturning his decision. *Major League Baseball Players Assoc. v. Garvey*, 532 U.S. 1015, 121 S. Ct. 1724, 149 L. Ed. 2d 740 (2001).

South Carolina courts have interpreted this standard narrowly. "Factual and legal errors by arbitrators do not constitute an abuse of their powers . . . . A party may not attempt to relitigate the merits of the arbitrators' resolution of the arbitrable issues under the guise of questioning the arbitrators' power." *Pittman Mortgage Co. v. Edwards*, 327 S.C. 72, 76-77, 488 S.E.2d 335, 338 (1997) (citations omitted). The Fourth Circuit has interpreted the fourth justification in section 10 of the FAA (that the arbitrator exceeded his power) to mean that an arbitrator must act in *manifest disregard of the law* for his decision to be overturned. *See Gallus Investments, L.P. v. Pudgie's Famous Chicken, Ltd.*, 134 F.3d 231 (4th Cir. 1998).

In light of the narrow standards of review in both cases, we uphold the arbitrator's awards in *Bazzle* and *Lackey*. Green

Tree did not allege any fraud, corruption, or other misconduct by the arbitrator that would warrant vacating his decision to certify the class or his award under the first three justifications listed in section 10 of the FAA. 9 U.S.C. § 10. That leaves manifest disregard of the law as the only possible justification for overturning the arbitrator's awards. In our opinion, the arbitrator did not act in manifest disregard of the law. As Green Tree noted in its brief, manifest disregard of the law occurs when the arbitrator knew of a *governing* legal principle yet refused to apply it, *and* the law disregarded was well defined, explicit, and clearly applicable to the case. (App. Br. p. 12) (citing *Trident Technical College v. Lucas Stubbs, Ltd.*, 286 S.C. 98, 333 S.E.2d 781 (1985), *cert. denied* 474 U.S. 1060, 106 S. Ct. 803, 88 L. Ed. 2d 779, (1986)).

As discussed, the issue of whether class-wide arbitration is permissible when the agreement is silent was not settled in this state at the time of the *Bazzle* and *Lackey* arbitrations. Therefore, the arbitrator did not act in manifest disregard of the law by permitting it to proceed.[23] Accordingly, we uphold the arbitrator's awards.

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[23] In addition, Green Tree argues that the arbitrator exceeded his powers when he awarded statutory penalties under S.C. Code Ann. § 37-10-102(a). The Bazzle and Lackey plaintiffs argue that the attorney preference statute upon which their allegations are based authorizes class actions filed before May 2, 1997 to proceed. South Carolina Code Ann. § 37-10-102 requires creditors of loans secured by real estate to ascertain the buyer's preference as to legal counsel prior to closing. The creditor complies with this requirement as long as it gives notice to the buyer of the preference information in a manner specified in the statute. Section 37-10-102 does not provide the penalties for violation of this requirement; penalties are provided in section 37-10-105. This section was amended in 1997 and now prohibits class actions. In its amendment, however, the legislature provided specifically that "any actions filed as class actions, without regard to certification, prior to May 2, 1997, may proceed, but with remedies pursuant to section 37-10-105 as amended." 1997 Act No. 99, § 1. As such, the arbitrator did not act in manifest disregard of the law by awarding penalties provided for in the amended section 37-10-105.

III. Due Process Rights of Absent Class Members

Green Tree and the Amici argue that the absent class members' due process rights were violated by the class-wide arbitration of their claims. The *Bazzle* and the *Lackey* plaintiffs, on the other hand, claim the rights of the absent class members were adequately protected through proper notice. Regardless, both classes of plaintiffs argue that this issue is not preserved for review because Green Tree failed to raise it in a timely fashion. We agree that the issue was not preserved for review, and, further, find no evidence that the rights of the class members were not protected in this case.

It is well-settled that an issue may not be raised for the first time on appeal. In order to preserve an issue for appellate review, the issue must be (1) raised to and ruled upon by the lower court, (2) by the appellant, (3) in a timely manner, and (4) with sufficient specificity. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000); *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998); Toal, Vafai, & Muckenfuss, *Appellate Practice in South Carolina* at 66 (S.C. Bar 1999).

In *Bazzle*, Green Tree first raised the issue of the absent class members' due process rights in its motion to vacate the arbitrator's final award. Green Tree argued vaguely that "the Arbitrator violated certain due process protections afforded by the Fourteenth Amendment and the South Carolina Constitution." To be preserved, the issue must have been raised and ruled upon by the trial court at the time the class was certified. *I'On, L.L.C. v. Town of Mt. Pleasant*. As Green Tree gave the trial court no opportunity to address this issue, it is procedurally barred. *Id.*

Similarly, in *Lackey*, Green Tree did not raise the due process rights of the absent class members when it moved to decertify the class before the arbitrator. Green Tree raised this

issue for the first time when it argued that the arbitrator's final award should be vacated. Because it did not give the arbitrator an opportunity to rule upon this issue, Green Tree failed to preserve it for review before this Court. *I'On; Wilder.*

Green Tree has not articulated precisely how it believes the class members' due process rights have been violated. In any case, the class members' rights appear to have been properly protected by the notice given to all of them.[24] Green Tree was given the opportunity to review and comment on the notice sent and did not voice an objection to it at that time. Although protection of the due process rights of absent class members is an essential component in all class actions, and one which may necessitate particular attention in class-wide arbitrations, Green Tree has not presented the Court with the means to address it properly.[25]

CONCLUSION

For the foregoing reasons, we AFFIRM the arbitrator's awards in both cases.

MOORE, WALLER, BURNETT, JJ., and Acting Justice George T. Gregory, Jr., concur.

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[24] *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985) (holding procedure followed whereby descriptive notice sent to by first-class mail to each class member with explanation of right to opt-out fully satisfied due process).

[25] For a discussion on protection of due process rights, *see Phillips Petroleum v. Shutts*; 42 Wm & Mary L. Rev. 1.

APPENDIX B

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
COURT OF COMMON PLEAS

Civil Action No. 00-CP-18-443
F/K/A C/A NO. 97-CP-18-258

LYNN W. BAZZLE AND BURT A. BAZZLE,
in a representative capacity on behalf of a class and for all others similarly situated,
Plaintiffs,

v.

GREEN TREE FINANCIAL CORPORATIONS a/k/a GREEN TREEN ACCEPTANCE CORPORATION a/k/a GREEN TREE FINANCIAL SERVICES CORPORATION n/k/a CONSECO FINANCE, INC.,
Defendants.

ORDER CONFIRMING AWARD

This matter comes before the Court upon Plaintiffs' Motion to Confirm final Order and Award in Arbitration and Defendants' Motion to Vacate Arbitrator's Award. Present at the hearing were Mary Leigh Arnold, Esquire, Bradford P. Simpson, Esquire and Steven W. Hamm, Esquire, attorneys for Plaintiffs, and Herbert Hamilton, Esquire and Robert Byrd, Esquire, attorneys for Defendants. Having reviewed the motions, memoranda and having heard oral arguments, the Court is of the opinion that the Motion to Confirm should be granted and the Motion to Vacate should be denied.

PROCEDURAL HISTORY

On March 25, 1997, Burt and Lynn Bazzle commenced an action against Green Tree and Patton General Contracting (hereinafter "Patton") in the Court of Common Pleas, Dorchester County, South Carolina (Civil Action No. 97-CP-

18-258), arising out of a home improvement financing agreement. The Complaint includes several causes of action, including unconscionable conduct and violation of the attorney and insurance preference provision of the South Carolina Consumer Protection Code.

On April 21, 1997, the Bazzles filed an Amended Complaint, which incorporated class action allegations. On the same day, the Bazzles filed a Motion for Class Certification. On May 21, 1997, Green Tree filed an Answer to the Amended Complaint and filed a Motion to Compel Arbitration.

On December 5, 1997, the Bazzles' Motion for Class Certification and Green Tree's Motion to Compel Arbitration were heard. The Motion for Class Certification was filed first and heard first by the Court. After the Court granted Plaintiffs' Motion for Class Certification, Green Tree prosecuted its Motion to Compel Arbitration. This Court entered into and filed two (2) separate written Orders memorializing the Rulings of December 5, 1997: (1) an Order Granting Class Certification; and (2) an Order granting Green Tree's Motion to Compel Arbitration.

On January 20, 1998, Green Tree filed a Motion for Reconsideration of the Court's Order granting class certification. On February 24, 1998, a hearing was held on Green Tree's Motion for Reconsideration, which was denied by written Order dated March 17, 1998. On or about April 1, 1998, Green Tree filed a Notice of Appeal.

On April 28, 1998, the Court of Appeals entered an Order dismissing the appeal on the grounds that an Order granting class certification is interlocutory and non-appealable. On or about May 7, 1998, Green Tree filed a Petition for Rehearing. On June 12, 1998, the Court of Appeals denied Green Tree's Motion for Reconsideration.

On June 24, 1998, Green Tree filed a Petition for Writ of Certiorari. On February 5, 1999, the South Carolina Supreme

Court dismissed Green Tree's Petition for Writ of Certiorari and remitted the case to the Clerk of Court for Dorchester County.

On February 24, 1999, the Bazzles filed a Motion to Compel Appointment of Arbitrator. On or about May 6, 1999 Green Tree filed a Motion to Dismiss. On June 2, 1999, the Order Appointing Arbitrator was filed with the Dorchester Clerk of Court. The Order provided that the matter would be referred to the Honorable Thomas J. Ervin, whom had been appointed to Arbitrate the related case of *Lackey v. Green Tree Financial Corporation*, Civil Action No. 96-CP-06-073. The Court declined to hear the Motion to Dismiss due to lack of jurisdiction.

On January 28, 2000, a pre-trial conference was held in *Lackey*. At that time Green Tree requested that all home improvement loans contained in the *Lackey* matter be consolidated with the within action. The Arbitrator granted the request and consolidated all home improvement transactions in *Lackey* with the within action.

On March 23, 2000 a hearing was held before the Arbitrator on Defendant's Motion to Dismiss on the grounds that the Plaintiffs could not proceed with the matter due to their filing for relief under the United States Bankruptcy Code. The Motion to Dismiss was denied. The Arbitrator granted Defendant's request that an Amended Complaint be filed eliminating Patton General Contracting as a defendant and limiting the causes of action to breach of the attorney and insurance preference statute and unconscionability under the South Carolina Consumer Protection Code. The Amended Complaint in Arbitration was served on March 27, 2000.

On July 24, 2000, the Arbitrator executed a written Award providing as follows:

> Based upon careful review of the materials, cases, affidavits and testimony presented by counsel for the Plaintiffs and by Green Tree, and applying the relevant

precedential authority to the facts and record before me in this case, I have concluded that Green Tree's behavior in this matter was wilful, reckless, wanton and egregious, and therefore, awarded Plaintiffs the sum of $10,935,000.00. I also find the Plaintiffs should be reimbursed and awarded certain reasonable costs associated with the prosecution of this case in the amount of $18,252.00, which is one half of $36,504.00. I further conclude that a reasonable attorneys fee of $3,645,500.00 should be awarded to members of the Plaintiffs' class.

On July 25, 2000, Plaintiffs filed a Motion for Confirmation of Award. On or about August 24, 2000, Defendants filed a Motion to Vacate.

SCOPE OF REVIEW

In order to prevail in its motion to vacate and defeat the motion to confirm the arbitration award in this case, Green Tree must bear an extraordinary burden. Section 10 of the Federal Arbitration Act[1] provides extremely limited grounds for vacating an arbitration award:

> (1) Where the award was procured by corruption, fraud, or undue means.

[1] This Court previously held that this case was governed by the Federal Arbitration Act. The arbitration clause drafted by Green Tree and incorporated into its consumer credit sale contracts refers only to Section 1 of the FAA, and Plaintiffs maintain that the applicability of the FAA to this case should therefore be limited accordingly. Nevertheless, because the Court has held that this case is governed by the FAA, and because the corresponding provision of the South Carolina Uniform Arbitration Act addressing the standards for vacating an arbitration award is virtually identical to Section 10 of the FAA, Plaintiffs have relied upon the language of Section 10 and the cases construing that section while expressly reserving their argument limiting the applicability of the FAA to Section 1 only.

> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C.A. § 10. Green Tree has alleged no corruption, fraud, partiality or similarly proscribed conduct on the part of the Arbitrator; therefore, the arbitration award may be vacated only upon a showing that the Arbitrator exceeded his power or "imperfectly executed" his duties as described in subsection (4) quoted above. The Fourth Circuit Court of Appeals has interpreted the latter criterion to be limited to cases where the arbitrator demonstrated "manifest disregard of the law." *Upshur Coals Corp. v. United Mine Workers*, 933 F.2d 225, 229 (1991).

The courts have been uniform in declaring that judicial review of arbitration awards is extremely limited. The Fourth Circuit recently reiterated the longstanding policies limiting the scope of review available to parties wishing to have arbitral awards vacated:

> Limited judicial review is necessary to encourage the use of arbitration as an alternative to formal litigation. This policy is widely recognized, and the Supreme Court has often found occasion to approve it.
>
> A policy favoring arbitration would mean little, of course, if arbitration were merely the prologue to prolonged litigation. If such were the case, one would hardly achieve the twin goals of arbitration, namely,

settling disputes efficiently and avoiding long and expensive litigation. Opening up arbitral awards to myriad legal challenges would eventually reduce arbitral proceedings to the status of preliminary hearings. Parties would cease to utilize a process that no longer had finality. To avoid this result, courts have resisted temptations to redo arbitral decisions. As the Seventh Circuit put it, "arbitrators do not act as junior varsity trial courts where subsequent appellate review is readily available to the losing party."

Thus, in reviewing arbitral awards, a district or appellate court is limited to determining whether the arbitrators did the job they were told to do—not whether they did it well, or correctly, or reasonably, but simply whether they did it. Courts are not free to overturn an arbitral result because they would have reached a different conclusion if presented with the same facts.

Remney v. Painewebber, Inc., 32 F.3d 143, 146 (4th Cir. 1991) (internal citations and quotation marks omitted). *Accord, Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, 142 F.3d 188, 193 (4th Cir. 1998); *Richmond, Fredericksburg & Potomac R.R. Co. v. Transp. Communications Int'l Union*, 973 F.2d 276, 281-82 (4th Cir. 1992). In the *Apex Plumbing* case cited above, the Fourth Circuit stated simply that "the scope of review of an arbitrator's decision is among the narrowest known at law." 142 F.3d at 193. *Accord, Rock-Tenn Co. v. United Paperworkers Int'l Union*, 184 F.3d 330, 333 (4th Cir. 1999).

The courts have been clear and consistent in holding that the findings of fact and conclusions of law in an arbitral decision are only subject to being overturned by a court in the narrowest of circumstances. The Fourth Circuit has stated:

> Although we may disagree with an arbitrator's interpretation of a contract, we must uphold it so long as it draws its essence from the agreement. As long as the

> arbitrator is even arguably construing or applying the contract a court may not vacate the arbitrator's judgment. Consequently, an award may be overturned only if the arbitrator must have based his award on his own personal notions of right and wrong, for only then does the award fail to draw its essence from the collective bargaining agreement.
>
> Not only is an arbitrator's fact finding and contract interpretation accorded great deference, but its interpretation of the law is accorded deference as well. A legal interpretation of an arbitrator may only be overturned where it is in manifest disregard of the law. An arbitration award is enforceable "even if the award resulted from a misinterpretation of law, faulty legal reasoning or erroneous legal conclusion, and may only be reversed when arbitrators understand and correctly state the law, but proceed to disregard the same.

Upshur Coals Corp. v. United Mine Workers, 933 F.2d 225, 229 (4th Cir. 1991) (citations and internal quotation marks omitted).

Our state appellate courts have construed the permissible scope of review of arbitral decisions in an equally narrow manner. In *Harris v. Bennett*, 332 S.C. 238, 503 S.E.2d 782 (Ct. App. 1998), the South Carolina Court of Appeals stated:

> Our Supreme Court has clearly stated that arbitrators exceed their powers only if the issue resolved by them is not within the scope of the agreement to arbitrate. If an issue is within the scope of the arbitration agreement, the court need not review the merits of the decision. Factual and legal errors by arbitrators do not constitute an abuse of their powers under section 15-48-130(a)(3).

332 S.C. at 243-44, 503 S.E.2d at 785. The Supreme Court, in the decision referenced in *Harris*, held:

> The question of whether arbitrators have exceeded their powers relates to the arbitrability of the issue they have

> attempted to resolve. Arbitrators exceed their powers only if the issue resolved by them is not within the scope of the agreement to arbitrate. Factual and legal errors by arbitrators do not constitute an abuse of their powers, and the court is not required to review the merits of the decision so long as the arbitrators do not exceed their powers. A party may not attempt to relitigate the merits of the arbitrators' resolution of the arbitrable issues under the guise of questioning the arbitrators' power.
>
> Arbitrators need not specify their reasoning or the basis of the award so long as the factual inferences and legal conclusions supporting the award are "barely colorable." If the grounds for the award can be inferred from the facts, the award should be confirmed.

Pittman Mortgage Co. v. Edwards, 327 S.C. 72, 76-77, 488 S.E.2d 335, 338 (citations omitted).

CONCLUSION

A review of each of the grounds asserted by Defendants as a basis to vacate the Arbitrator's Award reveals that each basis, at best, is merely an assertion that the Arbitrator committed some factual or legal error. Although this Court does not agree that the Arbitrator committed a factual or legal error assuming such were the case, this Court lacks the authority to vacate the award. In addition, this Court notes that it has previously ruled on Green Tree's motion for reconsideration of class certification and there is no basis to address the issue again. NOW THEREFORE, IT IS

ORDERED that Plaintiffs' Motion to Confirm the Arbitration Award be and is hereby granted, and it is

FURTHER ORDERED that Defendant's Motion to Vacate the Arbitration Award be and is hereby denied, and it is

FURTHER ORDERED that the Arbitrator's Award of the sum of $10,935,000.00 statutory damages, plus costs in the

amount of $18,252.00, plus reasonable attorneys' fees in the amount of $3,645,000.00 is confirmed with interest to accrue on the total amount from July 25, 2000, at the legal rate of interest of 8.75%. Interest shall accrue from the filing of this Order at the legal rate of 14% on the total award including statutory penalties, costs, attorneys fees and interim interest earned between July 25, 2000 to the date of the filing of this Order.

AND IT IS SO ORDERED.

/s/ Patrick R. Watts
THE HONORABLE PATRICK R. WATTS
Special Circuit Court Judge

September 15, 2000
Summerville, South Carolina

APPENDIX C

STATE OF SOUTH CAROLINA
COUNTY OF BARNWELL
IN THE COURT OF COMMON PLEAS

[Filed Dec. 19, 2000]

Civil Action No.: 96-CP-06-073

DANIEL B. LACKEY, GEORGE BUGGS, AND FLORINE BUGGS,
in a representative capacity on behalf of a class
of all others similarly situated,
Plaintiffs,

vs.

GREEN TREE FINANCIAL CORPORATION, a/k/a GREEN TREE FINANCIAL SERVICES CORP., a/k/a GREEN TREE ACCEPTANCE CORP., n/k/a CONSECO FINANCE, INC.,
Defendant.

ORDER CONFIRMING FINAL ORDER
AND AWARD IN ARBITRATION AND
DENYING MOTION TO VACATE

This matter comes before the Court upon Plaintiffs' Motion to Confirm Final Order and Award in Arbitration issued on July 24, 2000 and Defendant's Motion to Vacate Arbitrator's Award.

This binding class arbitration Order addresses Green Tree Financial Corporation's (a/k/a Green Tree Acceptance Corporation a/k/a Green Tree Financial Services Corporation n/k/a Conseco Finance, Inc., hereinafter collectively "Green Tree") failure to comply with the attorney and insurance agent preference requirements of the South Carolina Consumer Protection Code ("Code") in its manufactured home transactions through September 25, 1995.

PROCEDURAL HISTORY

This action was commenced by Plaintiffs against Green Tree in the Court of Common Pleas for Barnwell County, South Carolina (Civil Action No. 96-CP-06-073), by the filing of the Summons and Complaint as a class action on May 28, 1996. (Plaintiffs' Exhibit Notebook 2, Item 47 (hereinafter "Notebook")). On July 30, 1996, Green Tree filed an Answer asserting various defenses. (Notebook 2, Item 56). On October 1, 1996, the Plaintiffs filed a Motion for Class Certification pursuant to Rule 23 of the South Carolina Rules of Civil Procedure. In response, Green Tree filed a Motion to Stay the Matter and to Compel Arbitration. The Circuit Court denied Green Tree's Motion to Compel arbitration and held that the arbitration clause was unconscionable.

Green Tree appealed the Circuit Court's ruling. The Court of Appeals reversed and remanded the case to the lower court, *Lackey v. Green Tree Financial Corp.*, 330 S.C. 388, 498 S.E.2d 898 (S.C. App. 1998). (Notebook 2, Item 48). On July 23, 1998, the parties entered into a Consent Order signed by Judge Rodney A. Peeples submitting the matter to binding arbitration. (Exhibit A attached). Green Tree reserved no rights under the Consent Order limiting the authority of the Arbitrator.

On August 19, 1998, a hearing was held before the Arbitrator on the issue of whether or not the Plaintiffs' class action could proceed in arbitration. After reviewing the briefs submitted by the Plaintiffs and Green Tree and at the conclusion of oral argument, the Arbitrator determined that a class action should proceed in arbitration based upon his review of the broadly drafted arbitration clause prepared by Green Tree and scheduled a hearing to determine whether the Rule 23 Requirements for class certification were met. The Arbitrator issued his Order Allowing Arbitration of a Class Action on August 28, 1998.

On September 22, 1998, Green Tree initiated a declaratory judgment action in Federal court and filed a Motion for Preliminary Injunction asserting Federal jurisdiction and seeking to prohibit the Arbitrator from certifying a class in arbitration. *Green Tree Financial Corp. v. Lackey, et al.*, Case No. 3:98-2750-17 (D.S.C. 1998). After a hearing, The Honorable Joseph F. Anderson, Jr. denied Green Tree's Motion and dismissed Green Tree's declaratory judgment action for lack of subject matter jurisdiction. (Notebook 2, Item 18).

On November 23, 1998, a hearing on Plaintiffs' Motion for Class Certification was held before the Arbitrator. Green Tree's counsel attended the hearing but declined to participate in the argument of the Motion. Green Tree and its counsel acknowledged that Green Tree had been given adequate notice and an opportunity to be heard. The Arbitrator found that the requirements for class certification were met and that class certification was appropriate, The Arbitrator's Order Certifying Class was issued on December 1, 1998. (Notebook 2, Item 49).

On December 4, 1998, Green Tree filed another declaratory judgment action and petition for injunction in state court in Barnwell County as Civil Action 98-CP-06-278. (Notebook 2, Item 41). Simultaneous with filing the declaratory action in state court, Green Tree also filed its Motion to Stay the arbitration proceedings. On January 6, 1999, The Honorable Gary E. Clary held a hearing on Green Tree's Motion to Stay these arbitration proceedings and denied Green Tree's Motion to Stay.

On August 19, 1999, the parties presented memorandums and oral arguments to the Arbitrator on several issues. At the conclusion of oral argument, the Arbitrator advised the parties of his determination on the following issues:

1. The remedy for violations of the attorney and insurance agent preference statute is provided in South

Carolina Code Ann. Section § 37-10-105 as amended by the General Assembly in 1997.

2. Green Tree was the "creditor" for the manufactured housing transactions it funded and was subject to the preference requirements contained in S.C. Code Ann. § 37-10-102(a).

3. Even if Green Tree was an "assignee" for purposes of the Code, Plaintiffs were not required to engage in a futile act by asking dealers to ascertain the preference of debtors after the credit transaction was already closed and finalized.

4. Green Tree was judicially estopped from asserting any claim that Green Tree Financial Corporation was not the proper party in interest.

5. Green Tree Financial Services Corporation was liable for the acts and omissions of Green Tree Financial Corporation.

6. Transactions closed outside of the state of South Carolina would not be included in the certified class.

7. Any penalty assessed by the Arbitrator for violations of the preference statute would be on a per-transaction basis.

On January 28, 2000, a pre-trial conference was held. At the time of the conference, the parties entered into a Consent Agreement bifurcating the case, and postponing trial for all class members with contracts dated after September 25,1995 for a later arbitration proceeding. (Notebook 2, Item 50).

The trial on this matter was heard by the Arbitrator on March 6, 7 & 8, 2000. At the conclusion of the trial, the Arbitrator issued an oral ruling advising the parties of his decision in this binding arbitration case. On May 31, 2000 a hearing was held at the conclusion of the Bazzle proceeding

in which the Arbitration took testimony and arguments on attorneys fees and set up the procedures for Green Tree to raise offset claims within 30 days or they were waived. On July 24, 2000 the Arbitrator issued his written order which is now the subject of the Motion to Vacate filed by the Defendant and the Motion to Confirm filed by Plaintiffs.

STANDARD OF REVIEW

In order to prevail in its Motion to Vacate the arbitration award in this case, Green Tree must bear an extraordinary burden. Section 10 of the Federal Arbitration Act [1] provides extremely limited grounds for vacating an arbitration award:

> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

[1] The South Carolina Court of Appeals previously held that this case was governed by the Federal Arbitration Act. The arbitration clause drafted by Green Tree and incorporated into its consumer credit sale contracts refers only to Section 1 of the FAA, and Plaintiffs assert that the applicability of the FAA to this case should therefore be limited accordingly. Nevertheless, because the Court of Appeals has held that this case is governed by the FAA, and because the corresponding provision of the South Carolina Uniform Arbitration Act addressing the standards for vacating an arbitration award is virtually identical to Section 10 of the FAA, Plaintiffs have relied upon the language of Section 10 and the cases construing that section while expressly reserving their argument limiting the applicability of the FAA to Section 1 only.

> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C.A. § 10. Green Tree has alleged no corruption, fraud, partiality or similarly proscribed conduct on the part of the Arbitrator; therefore, the arbitration award may be vacated only upon a showing that the Arbitrator exceeded his power or "imperfectly executed" his duties as described in subsection (4) quoted above. The Fourth Circuit Court of Appeals has interpreted the latter criterion to be limited to cases where the arbitrator demonstrated "manifest disregard of the law." *Upshur Coals Corp. v. United Mine Workers*, 933 F.2d 225, 229 (4th Cir. 1991).

The courts have been uniform in declaring that judicial review of arbitration awards is extremely limited. The Fourth Circuit recently reiterated the longstanding policies limiting the scope of review available to parties wishing to have arbitral awards vacated:

> Limited judicial review is necessary to encourage the use of arbitration as an alternative to formal litigation. This policy is widely recognized, and the Supreme Court has often found occasion to approve it.
>
> * * *
>
> Thus, in reviewing arbitral awards, a district or appellate court is limited to determining whether the arbitrators did the job they were told to do—not whether they did it well, or correctly, or reasonably, but simply whether they did it. Courts are not free to overturn an arbitral result because they would have reached a different conclusion if presented with the same facts.

Remney v. Painewebber, Inc., 32 F.3d 143, 146 (4th Cir. 1991) (internal citations and quotation marks omitted). *Accord, Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, 142

F.3d 188, 193 (4th Cir. 1998); *Richmond, Fredericksburg & Potomac R.R. Co. v. Transp. Communications Int'l Union*, 973 F.2d 276, 281-82 (4th Cir. 1992). In the *Apex Plumbing* case cited above, the Fourth Circuit stated simply that "the scope of review of an arbitrator's decision is among the narrowest known at law." 142 F.3d at 193. *Accord, Rock-Tenn Co. v. United Paperworkers Int'l Union*, 184 F.3d 330, 333 (4th Cir. 1999).

The courts have been clear and consistent in holding that the findings of fact and conclusions of law in an arbitral decision are only subject to being overturned by a court in the narrowest of circumstances. The Fourth Circuit has stated:

> Although we may disagree with an arbitrator's interpretation of a contract, we must uphold it so long as it draws its essence from the agreement. As long as the arbitrator is even arguably construing or applying the contract a court may not vacate the arbitrator's judgment. Consequently, an award may be overturned only if the arbitrator must have based his award on his own personal notions of right and wrong, for only then does the award fail to draw its essence from the [contract].
>
> Not only is an arbitrator's fact finding and contract interpretation accorded great deference, but its interpretation of the law is accorded deference as well. A legal interpretation of an arbitrator may only be overturned where it is in manifest disregard of the law. An arbitration award is enforceable "even if the award resulted from a misinterpretation of law, faulty legal reasoning or erroneous legal conclusion, and may only be reversed when arbitrators understand and correctly state the law, but proceed to disregard the same."

Upshur Coals Corp. v. United Mine Workers, 933 F.2d 225, 229 (4th Cir. 1991) (citations and internal quotation marks omitted).

Our state appellate courts have construed the permissible scope of review of arbitral decisions in an equally narrow manner. In *Harris v. Bennett*, 332 S.C. 238, 503 S.E.2d 782 (Ct. App. 1998), the South Carolina Court of Appeals stated:

> Our Supreme Court has clearly stated that arbitrators exceed their powers only if the issue resolved by them is not within the scope of the agreement to arbitrate. If an issue is within the scope of the arbitration agreement, the court need not review the merits of the decision. Factual and legal errors by arbitrators do not constitute an abuse of their powers under section 15-48-130(a)(3).

332 S.C. at 243-44, 503 S.E.2d at 785. The Supreme Court, in the decision referenced in *Harris*, held:

> The question of whether arbitrators have exceeded their powers relates to the arbitrability of the issue they have attempted to resolve. Arbitrators exceed their powers only if the issue resolved by them is not within the scope of the agreement to arbitrate. Factual and legal errors by arbitrators do not constitute an abuse of their powers, and the court is not required to review the merits of the decision so long as the arbitrators do not exceed their powers. A party may not attempt to relitigate the merits of the arbitrators' resolution of the arbitrable issues under the guise of questioning the arbitrators' power.
>
> Arbitrators need not specify their reasoning or the basis of the award so long as the factual inferences and legal conclusions supporting the award are "barely colorable." If the grounds for the award can be inferred from the facts, the award should be confirmed.

Pittman Mortgage Co. v. Edwards, 327 S.C. 72, 76-77, 488 S.E.2d 335, 338 (citations omitted).

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case was filed as a class action on May 28, 1996. From the beginning, Green Tree demanded that the case be arbitrated pursuant to the Arbitration clause included in its form contracts with consumers. After the Circuit Court found its arbitration clause to be unconscionable and denied Green Tree's motion to compel arbitration, Green Tree appealed to the South Carolina Court of Appeals. On March 16, 1998 the Court of Appeals reversed this Court and found that while the contracts were contracts of adhesion, that finding did not support a conclusion that the contracts were unconscionable. *Lackey, et al. v. Green Tree Financial Corp.*, 330 S.C. 388, 498 S.E.2d 898 (S.C. App. 1998).

Green Tree raised no issue to the Court of Appeals that the Plaintiffs class action allegations could not be addressed in the arbitration proceeding it consistently demanded. The Court of Appeals noted that the case was brought as a class action suit. Id. at 901. It is noteworthy that the Court of Appeals concluded that the Plaintiffs "failed to demonstrate that they are unable to get the same relief in arbitration which is available in a judicial setting." Id. at 905.

The Court of Appeals remanded this case to this court "for further proceedings." Up to that point, Green Tree had never stated its position that the Arbitrator could not consider the class allegations contained in the complaint filed by the Plaintiffs almost two years earlier. Green Tree did not take any action, including filing a Motion to Strike Class Allegation from the Plaintiffs complaint, prior to consenting to the selection of the Arbitrator on July 23, 1998.

Green Tree now claims that the Arbitrator was without authority to determine or decide whether the matter could proceed as a class action in arbitration. Green Tree has waived this argument. The Consent Order signed on July 23,

1998 reserves no claims or issues for the Court to decide prior to submitting the matter to binding arbitration. The Consent Order is attached as Exhibit "A". Green Tree filed no reservation of rights on any issues, including potential class certification, for a ruling by the Court prior to providing its written consent to be bound by the decision of the Arbitrator selected by both parties. This Court has no authority to consider the issue of class certification which was never raised by Green Tree below prior to the binding arbitration proceeding it repeatedly demanded. Green Tree was afforded exactly the proceeding in binding arbitration that it sought. Green Tree cannot seek to correct its failure to raise this issue after the Court of Appeals issued its Order and prior to Green Tree's written agreement contained in the July 23, 1998 Consent Order giving the Arbitrator jurisdiction to handle all matters, including all pending motions.

A recent case from the Supreme Court of the United States is instructive here, and indeed, it is dispositive of Green Tree's arguments concerning the standard of review applicable to the Arbitrator's decision on the arbitrability of class treatment. In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S. Ct. 1920, 131 L.Ed.2d 985 (1995). The Court held that the questions of whether a Court or an Arbitrator hold the primary power to decide arbitrability turns upon the agreement of the parties. If the parties agree to submit the questions of arbitrability itself to arbitration, then the standard of review applicable to the arbitrator's decision on arbitrability is the same as that applicable to the arbitrator's decision on any other issue which the parties agreed to arbitrate. *First Options*, 514 U.S. at 943.

Similarly, the Fourth Circuit has stated:

> It would be odd if having consented to have the arbitrator decide what its legal rights . . . were, [appellee] could then have the same questions redetermined by two courts— the district court and this court. . . Since

> appellee, by submitting without a peep to the arbitrator's jurisdiction, admitted the competence of the arbitrator to determine its "legal rights," it cannot complain that the arbitrator exceeded his authority by determining them.

Richmond, Fredericksburg & Potomac R.R. Co. v. Transp. Communications Int'l Union, 973 F.2d at 280 (citations omitted).

Thus, in this case, in which the parties willingly submitted to arbitration the questions of whether the Arbitrator could adjudicate a class action, the Arbitrator's decision is not subject to review except to the extent that Green Tree can present grounds for vacatur. Green Tree is simply unable to make the showing required to justify this extraordinary relief.

A review of the record in arbitration reflects that Green Tree did not argue to the Arbitrator that only a Court could consider whether or not the case could proceed as a class action in arbitration. Green Tree argued to the Arbitrator that its arbitration clause did not permit or authorize class actions and urged the Arbitrator to rule that the arbitration clause would not permit the case to proceed as a class action. The Arbitrator, after considering all the arguments and materials submitted by the parties, ruled against Green Tree's position. Only after the Arbitrator decided that the arbitration clause permitted class arbitration and that class treatment was appropriate in this case did Green Tree object. Green Tree's failure to argue to the Arbitrator that only a Court could grant class certifiction cannot now be cured by seeking to vacate the Arbitrator's Order.

The Courts have recognized that parties can manifest their agreement to arbitrate issues by their conduct. *Rock-Tenn Company v. United Paperworkers International Union*, 184 F.3d 330 (4th Cir. 1999). Plaintiffs argue that Green Tree's failure to reserve an argument with the Circuit Court that the Arbitrator could not decide class arbitration prior to

submitting the entire case to the Arbitrator is a waiver of any claimed right to later challenge the Arbitrator's authority in court. The Court agrees.

Numerous cases exist where courts certified a class of plaintiffs who proceeded in arbitration as class action. See *Keating v. Superior Court*, 31 Cal.2d 584, 183 Cal. Rptr. 360, 645 P.2d 1192 (1989); *Izzi v. Mesquite Country Club*, 186 Cal. App. 2d 1309, 231 Cal. Rptr. 315 (1986); *Lewis v. Prudential Bache Securities*, 179 Cal. App. 3d 935, 945-46, 225 Cal. Rptr. 69 (Cal. App. 4 Dist. 1986); *Dickler v. Shearson Lehman Hutton, Inc.*, 408 Pa. Super. 294, 596 A.2d 860 (1991); *Boyton v. Barnett*, 238 Ga. 417, 233 S.E.2d 185 (1977); and *Callaway v. Carswell*, 240 Ga. 579, 252 S.E.2d 103 (1978). See also *Nicholson v. CPC Intern., Inc.*, 877 F.2d 227 (3rd Cir. 1989) (dissent noting "arbitrations may go forward as class actions"). In addition to advancing as a class action, it is also an acceptable practice in arbitration to consolidate matters. Consolidations avoid duplicative litigation in the arbitration forum just as in court procedures. *Episcopal Housing Corp. v. Federal Insurance Co.*, 273 S.C. 181, 255 S.E.2d 451(1979); *Plaza Development Services v. Joe Harden Builder, Inc.*, 294 S.C. 403, 365 S.E.2d 231 (1988); see *New England Energy v. Keystone Shipping Co.*, 855 F.2d 1 (1st Cir. 1988); and *Maxum Foundations, Inc. v. Salus Corporation*, 817 F.2d 1086 (1987).

The Arbitrator received this case from the Circuit Court with a pending Motion to Certify a Class which was filed on October 1, 1996. Having failed to take any action to strike the class allegations contained in the complaint or the Motion to Certify prior to submitting the entire matter to the jurisdiction of the Arbitrator, Green Tree cannot now argue against the decision of the Arbitrator. Having presented its argument to the Arbitrator that its arbitration clause prevented class arbitration, it is clear that Green Tree consented to having the Arbitrator decide this issue. Green Tree's complaint that the

Arbitrator exceeded his authority is remarkable in light of Green Tree's failure to take any action or reserve any right to address the Arbitrator's authority prior to proceeding into binding arbitration. The Arbitrator took the case as presented to him, considered the entire contract and the law and issued his ruling. Green Tree presented its argument on class certification in binding arbitration and lost. The Court has limited authority to disturb an Arbitration Order and declines to interfere with the very arbitration proceeding that Green Tree demanded as the process to resolve the class action lawsuit filed by the Plaintiffs over four years ago.

In *Rock-Tenn Co.*, supra, the Fourth Circuit held that "even when a party could have refused arbitration in the first instance, and even when the issue resolved by the arbitrator is one 'of law,' if that party 'voluntarily and unreservedly submits an issue to arbitration, he cannot later argue that the arbitrator had no authority to resolve it.'" *Rock-Tenn Co.*, 184 F.3d at 334-35. The Court distinguished the *Rock-Tenn* case from *A. T. Massey Coal, Co. v. United Mine Workers*, 799 F.2d 142 (4th Cir. 1986). A. T. Massey had successfully challenged arbitrability of a particular issue in Court *prior to the case being referred to arbitration.* The Fourth Circuit held that Rock-Tenn could not challenge the arbitrator's ruling in that case because the Company could have done so prior to the case being sent to arbitration but elected to allow the arbitrator to decide the issue. Similarly, Green Tree could have asked the Circuit Court to strike the Plaintiffs' class allegations prior to the entry of the Consent Order referring the case to the arbitrator. Instead, Green Tree elected to have the arbitrator determine the legal question of whether class treatment was within the scope of arbitrability. Green Tree cannot now be heard to complain that the arbitrator exceeded his powers after it had previously consented to allowing the arbitrator to decide the issue.

Arbitration is a contractual right. Federal courts look to state law for contract interpretation. "Every contract entered into in this state embodies in its terms all applicable laws of the state just as completely as if the contract expressly so stipulated. *Inabinet v. Royal Exchange Assoc. of London*, 162 S.E. 599 (S.C. 1932).

The Court notes that the arbitration clause drafted by Green Tree authorizes the Arbitrator to have "all powers provided by the law and the contract." In addition, the arbitration clause covers ". . . all disputes arising under case law, statutory law and all other laws including, but not limited to, all contract, tort and property disputes, will be subject to binding arbitration in accord with this contract." Id. Green Tree argues that the Arbitrator powers "were limited by the parties arbitration agreement." Memorandum of Green Tree in Support of Motion to Vacate Arbitrator's Award; p.2. This "all powers" language provided by the clause is in addition to the contract rights and remedies and includes the right to determine class arbitration.

Green Tree ignores the law that applies to this case. In 1997, the South Carolina General Assembly adopted a new law revising the attorney preference statute at issue during arbitration of this case. Section 5 of Act 99 of 1997 expressly stated that any actions filed as class actions on or before of May 2, 1997 "may proceed."[2] Green Tree seeks to choose which "law" its arbitration clause references with regard to

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[2] Section 5 of Act 99 of 1997 (H.3272, R.217) reads as follows:

"SECTION 5. This act takes effect upon approval by the Governor and applies to causes of action, including appeals, pending on May 2, 1997. Any actions filed as class actions, without regard to certification, filed on or before May 2, 1997, may proceed, but with remedies pursuant to Section 37-10-105 as amended in Section 1 of this act. The three-year statute of limitations provided herein applies to all actions commenced after May 2, 1997. No inference should be drawn as to the applicable statute of limitations for any existing action."

the powers given to the Arbitrator. The General Assembly provided direct statutory authority and law to the Arbitrator as he considered the powers afforded to him under Green Tree's contract. Since the 1997 legislative amendment authorized the instant case to proceed as a class action, Green Tree cannot now claim that its arbitration clause was silent on the issue of class arbitration in light of its own language referencing all powers provided by the law and statutory law and all other laws. The Arbitrator applied the law when he concluded that the case could proceed as a class action in arbitration. The Court of Appeals stated that Plaintiffs lost no rights by being forced into arbitration. *Lackey v. Green Tree*, 330 S.C. 388, 498 S.E.2d 898 (S.C. App. 1998). Id. at 400-01. The Arbitrator, applying the law that existed at the time, determined that a class action could proceed in arbitration, considered and applied the law referenced in Green Tree's own arbitration clause. This Court concludes that the Arbitrator acted within the express authority granted by the arbitration clause drafted by Green Tree. None of the cases cited by Green Tree involve a specific state law authorizing a class action to proceed as a matter of law.

South Carolina case law would not be applicable only if preempted by the FAA. But, state law is only preempted to the extent it stands as an obstacle to arbitration. *Volt Info. Sciences v. Leland Stanford Jr. U.*, 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). The FAA places arbitration agreements on an equal footing with contracts generally. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270-271, 130 L.Ed.2d 753, 115 S.Ct. 834 (1995) and *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 684-685, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996).

The court in *Blue Cross of California, et al. v. Elizabeth Farquar, et al.*, 67 Cal.App. 4th 42, 1998 Cal.App. Lexis 845, 79 Cal. Rptr.2d 779 (1998), addressed the issue of class-wide arbitration in which a case falls under the FAA. The first question was whether the FAA preempted state law on this

question, and the court found that it did not. The court in *Blue Cross* then analogized the consolidation of arbitration as support for ordering class arbitration. Consolidation was authorized by statute in California.

In the context of a dispute governed by the FAA, the South Carolina Supreme Court allowed the *consolidation* of arbitration proceedings even though the contract language did not explicitly provide for consolidation. *Episcopal Housing Corp. v. Federal Insurance Co.*, 273 S.C. 181, 255 S.E.2d 451 (1979). South Carolina also authorizes the consolidation (joinder) of arbitration proceedings under § 15-48-60.

Green Tree relies on *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995) and argues that arbitration and class certification are mutually exclusive in the absence of a specific provision allowing class treatment. It is questionable whether the Fourth Circuit would follow *Champ*. *Champ* is distinguishable. Unlike South Carolina law, Illinois law did not allow class arbitration. In *Champ*, the motion to compel was granted and the district court never ruled on the motion to certify the class. Thereafter, the plaintiff in *Champ* filed a motion requesting that the court certify her as the class representative in the arbitration. The court should not have even exercised jurisdiction over the matter once it ordered arbitration although this appears not to have been addressed on appeal. See Order of Judge Joseph F. Anderson, Jr., denying Green Tree's Motion to enjoin the class arbitration in this case. (Notebook 5, Item 12).

The contract itself states that all disputes, claims or controversies relating to the contract or the validity of the arbitration clause or the entire contract shall be resolved by binding arbitration by the Arbitrator. Here, Green Tree drafted its own arbitration clause making clear that the parties agreed to arbitrate arbitrability and the decision by the Arbitrator that the clause afforded him appropriate authority to arbitrate this matter as a class action is binding on Green Tree.

Green Tree willingly submitted the issue of class arbitration to the Arbitrator in light of its failure to raise the issue prior to arbitration. Green Tree sought to have the Arbitrator issue a decision against class certification in arbitration and failing in that effort, now seeks to change its position by arguing the Arbitrator had no authority. Green Tree cannot now argue both positions in an effort to vacate the decision issued in this binding arbitration.

Green Tree further asserts that the arbitrator failed to properly apply the law with regard to S.C. Code of Law Sections 37-5-202, 37-10-105 and 37-2-404. In addition, Green Tree asserts that the Arbitrator failed to properly apply the pertinent law to the content of the class Notice and failed to properly review the appropriate law relating to the recovery of attorney's fees. This Circuit has repeatedly held that, "as a matter of law neither misinterpretation of a contract nor an error of law constitutes a ground on which an award can be vacated. Indeed, a conclusion reached by the [arbitrator], even if questionable . . . does not constitute exceeding [his] power." *Apex Plumbing*, 142 F.3d at 193-94. The Court again notes that a legal interpretation of an arbitrator is accorded great deference. *Upshur Coals Corporation v. United Mine Workers of America*, 933 F.2d 225 (4th Cir. 1991). The statutory grounds to vacate an arbitration award do not permit rejection of an award based upon a parties disagreement with a particular result. Green Tree now seeks to transform the arbitration proceeding it demanded into a purely advisory exercise. This Court will not permit such a result and has no authority to do so. As the Fourth Circuit noted in 1993,

> [o]pening up arbitral awards to myriad legal challenges would eventually reduce arbitral proceedings to the status of preliminary hearings. Parties would cease to utilize a process that no longer had finality. To avoid this result, Courts have resisted temptations to redo arbitral

> decisions. As the Seventh Circuit put it, "arbitrators do not act as junior varsity trial courts where subsequent appellate review is readily available to the losing party."
>
> *Remmey v. Paine Webber, Inc.*, 32 F.3rd 143 (4th Cir. 1994) quoting *National Wrecking Co. v. International Bhd. of Teamsters, Local 731*, 990 F.2d 957, 960 (7th Cir. 1993).

Finally, Green Tree contests the methodology and results of the Arbitrator's analysis of the question of attorney's fees. The Court first notes that the Arbitrator's decision regarding attorney's fees are due the same degree of deference as are his decisions on other matters. The Court further notes upon review of the record that the Arbitrator considered each of the six factors prescribed under South Carolina law as prerequisites to an award of fees. The Court also has considered the rule that where a fee award by a trial court is supported by any competent evidence, an appeal will not prevail. *Baron Data Systems, Inc. v. Loter*, 297 S.C. 382, 377 S.E.2d 296 (1989). Because an arbitral award is even more difficult to overturn than a trial court's decision under such conditions, it is inconceivable that the Arbitrator's award of attorney's fees here could be subject to vacatur. The Court therefore declines to vacate the arbitral award of attorney's fees.

The Final Order and Award in Arbitration in this reflects a detailed and careful review of all matters presented to the Arbitrator. This Court would not be free to vacate this award even if it would have reached a different conclusion. It is clear that the decision reached by the Arbitrator, a former Circuit Court Judge with many years of judicial experience, represents a considered and careful review of all matters, and this Court declines to intervene as requested by Green Tree.

The Court has carefully reviewed and considered all arguments presented by the parties in this matter. Any matters presented by the parties which have not been specifically discussed in this Order have been considered and rejected.

For the aforementioned reasons I confirm the Arbitrator's award of $9,200,000 in statutory damages, $18,252.00 in costs, and $3,066,666.00 in attorneys fees;

NOW THEREFORE this Court having reviewed the Defendants' Motion to Vacate the Arbitrator's Award and having heard oral arguments and for the reasons stated above, IT IS

ORDERED that Plaintiffs' Motion for Confirmation of the Arbitrator's Award filed on July 25, 2000, be and is hereby granted, and it is

FURTHER ORDERED that Defendants' Motion to Vacate the Arbitrator be and is hereby denied, and it is

IT IS THEREFORE ORDERED that the Clerk of Court for Barnwell County, South Carolina enter a judgment for $12,284,918.00 plus the interest which has accrued at the rate of 8.75%, from the filing of this award on July 25, 2000 until the entry of this judgment, against the Defendant, Green Tree Financial Corporation, a/k/a Green Tree Financial Services Corporation, a/k/a Green Tree Acceptance Corporation, n/k/a Conseco Finance, Inc.

Upon entry of this judgment by the Clerk of Court this judgment will accrue interest at the legal rate of 14% per annum until it is satisfied of record.

IT IS SO ORDERED.

/s/ Rodney A. Peeples
RODNEY A. PEEPLES
Chief Administrative Judge
Second Judicial Circuit

December 19, 2000

APPENDIX D

IN ARBITRATION
STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
COURT OF COMMON PLEAS

[Filed Jul. 25, 2000]

Civil Action No. 97-CP-18-258

LYNN W. BAZZLE AND BURT A. BAZZLE,
in a representative capacity on behalf of a class and
for all others similarly situated,
Plaintiffs,

v.

GREEN TREE FINANCIAL CORPORATION a/k/a GREEN TREE ACCEPTANCE CORPORATION a/k/a Green TREE FINANCIAL SERVICES CORPORATION n/k/a CONSECO FINANCE, INC.,
Defendants.

FINAL ORDER AND AWARD IN ARBITRATION

This binding class arbitration deals with Green Tree Financial Corporation's (a/k/a Green Tree Acceptance Corporation a/k/a Green Tree Financial Services Corporation n/k/a Conseco Finance, Inc., hereinafter collectively "Green Tree") failure to comply with the attorney and insurance agent preference requirements of the South Carolina Consumer Protection Code ("Code") in its home improvement transactions through April 21, 1997.[1]

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[1] This class action previously consisted of all home improvement retail installment transactions secured by real estate located in South Carolina entered into three years prior to April 21, 1997. At the request of Green Tree and with the consent of Plaintiffs, a portion of the class in the related

A. PROCEDURAL HISTORY

On March 25, 1997, Burt and Lynn Bazzle commenced an action against Green Tree and Patton General Contracting (hereinafter "Patton") in the Court of Common Pleas, Dorchester County, South Carolina (Civil Action No. 97-CP-18-258), arising out of a home improvement financing agreement. (Notebook 4, Item 5)[2]. The Complaint includes causes of action for unconscionable conduct and violation of the attorney and insurance preference provision of the South Carolina Consumer Protection Code.

On April 21, 1997, the Bazzles filed an Amended Complaint, which incorporated class action allegations. (Notebook 4, Item 5). On the same day, the Bazzles filed a Motion for Class Certification. (Notebook 4, Item 3). On May 21, 1997, Green Tree filed an Answer to the Amended Complaint (Notebook 4, Item 7) and filed a Motion to Compel Arbitration. (Notebook 4, Item 9).

On December 5, 1997, The Honorable Patrick R. Watts, Master-In-Equity, sitting as Special Circuit Court Judge, heard and ruled on the Bazzles' Motion for Class Certification and Green Tree's Motion to Compel Arbitration. The Motion for Class Certification was filed first, and therefore, heard first. After the Court heard and granted Plaintiffs' Motion for Class Certification, Green Tree pursued its Motion to Compel Arbitration. At Green Tree's own

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case of *Lackey et. al. v. Green Tree Financial Corporation et. al.*, (Civil Action 96-CP-06-073) (hereinafter "*Lackey*"), involving, in part, home improvement transactions secured by real estate located in the State of South Carolina and entered into three years prior to May 28, 1996, were joined and tried with this action. (Notebook 2, Item 50). Thus, this action consists of all home improvement transactions secured by real estate located in the State of South Carolina with payments made between May 28, 1993 and April 21, 1997.

[2] References to Notebook and Items are to Arbitration Hearing Exhibits.

insistence, its Motion to Compel Arbitration was granted after the Class was certified.

Judge Watts entered into and filed two (2) separate written Orders memorializing his Rulings of December 5, 1997: (1) an Order Granting Class Certification (Notebook 4, Item 16); and (2) an Order granting Green Tree's Motion to Compel Arbitration. (Notebook 4, Item 17). The Order Granting Class Certification directed Green Tree to provide the Plaintiffs with the names and addresses of each class member within sixty (60) days and further directed the Plaintiffs' counsel, to as soon as possible thereafter, and no later than one hundred and twenty (120) days from the date of the Order to provide actual notice to the class members. On January 7, 1998, Judge Watts executed a Supplemental Order to the Order Granting Class Certification to correct a scrivener's error. (Notebook 4, Item 19).

On January 20, 1998, Green Tree filed a Motion for Reconsideration of the Court's Order granting class certification. (Notebook 4, Item 20). On February 24, 1998, a hearing was held on Green Tree's Motion for Reconsideration. On March 17, 1998, The Honorable Patrick R. Watts, denied Green Tree's Motion for Reconsideration. On or about April 1, 1998, Green Tree filed a Notice of Appeal. (Notebook 4, Item 23).

Shortly after receiving Green Tree's Notice of Appeal, the Clerk of the Court of Appeals wrote to counsel of record inquiring as to the appropriateness of the appeal. The Bazzles responded to the inquiry by filing a Motion to Dismiss on the grounds that the appeal was interlocutory. (Notebook 4, Item 24).

On April 28, 1998, the Court of Appeals entered an Order dismissing the appeal on the grounds that an Order granting class certification is interlocutory and non-appealable. (Notebook 4, Item 26). On or about May 7, 1998, Green Tree filed

a Petition for Rehearing. (Notebook 4, Item 28). On June 12, 1998, the Court of Appeals denied Green Tree's Motion for Reconsideration. (Notebook 4, Item 29).

On June 24, 1998, Green Tree filed a Petition for Writ of Certiorari. On February 9, 1999, the South Carolina Supreme Court dismissed Green Tree's Petition for Writ of Certiorari and remitted the case to the Clerk of Court for Dorchester County.

On February 24, 1999, the Bazzles filed a Motion to Compel Appointment of Arbitrator. (Notebook 4, Item 52). On or about May 6, 1999 Green Tree filed a Motion to Dismiss. (Notebook 4, Item 42). The grounds for the Motion to Dismiss were the filing of foreclosure proceedings against the Bazzles by their first mortgage holder and the filing for relief by the Bazzles under Chapter 13 of the United States Bankruptcy Code. On May 20, 1999, the Plaintiffs filed opposition to the Motion to Dismiss. (Notebook 4, Item 41).

On May 20, 1999, a hearing was held before The Honorable Patrick R. Watts, for the purposes of hearing the Bazzles' Motion to Compel the Appointment of an Arbitrator and Green Tree's Motion to Dismiss. At the time of the hearing Judge Watts directed that this Arbitrator be appointed due to a previous agreement reached between the parties. Judge Watts declined to hear the Motion to Dismiss on the ground he lacked jurisdiction. On June 2, 1999, the Order Appointing Arbitrator was filed with the Dorchester Clerk of Court. (Notebook 4, Item 50).

On or about March 16, 2000, Green Tree resubmitted its Motion to Dismiss to this Arbitration due to the Bazzles filing for bankruptcy. On March 23, 2000, a hearing was held at which time the Motion to Dismiss was denied. Green Tree also argued at the time of the hearing that the causes of action should be limited to those relating to violations of the South Carolina Protection Code and that Patton should be removed

as a Defendant. At Green Tree's insistence, a Bifurcated Second Amended Complaint in Arbitration against Green Tree alone, including class action allegations, was served on March 27, 2000. (Notebook 2, Item 36).

The Second Amended Complaint set forth two causes of action: (1) violation of the South Carolina attorney/insurance preference statute, §37-10-102 *et. seq.*; and (2) unconscionable conduct in violation of §37-10-105. On April 11, 2000, Green Tree filed its Answer. (Notebook 2, Item 46). In the Answer Green Tree made several admissions. These admissions are as follows: (1) In paragraph 5 Green Tree admits that the Bazzles were solicited by an agent of Green Tree; (2) In paragraph 9 Green Tree admits that it prepared certain of the documents for the transaction; (3) In paragraph 11 Green Tree admits that it comes within the definition of a creditor under the South Carolina Consumer Protection Code; (4) In paragraph 12 Green Tree admits the transactions are consumer credit transactions as defined in the Consumer Credit Code; and (5) In paragraph 14 Green Tree admits to having knowledge of the filing of the Broomfield Complaint.

B. RULINGS IN RELATED MATTERS BINDING THIS CASE

On August 19, 1999, in conjunction with the *Lackey* case, the parties to this arbitration presented memoranda and oral arguments to the Arbitrator on several issues. At the conclusion of oral argument, the Arbitrator advised the parties of his determination of the following issues:

1. The remedy for violations of the attorney and insurance agent preference statute is provided in South Carolina Code Ann. §37-10-105 as amended by the General Assembly in 1997.
2. Green Tree was the "creditor" for the transactions it funded and was subject to the preference requirements contained in S.C. Code Ann §37-10-102(a).

3. Even if Green Tree was an "assignee" for purposes of the Code, Plaintiffs were not required to engage in a futile act by asking dealers to ascertain the preference of debtors after the credit transaction was already closed and finalized.
4. Green Tree was judicially estopped from asserting any claim that Green Tree Financial Corporation was not the proper party in interest.
5. Green Tree Financial Services Corporation was liable for the acts and omissions of Green Tree Financial Corporation.
6. Transactions closed outside of the State of South Carolina would not be included in the certified class.
7. Any penalty assessed by the Arbitrator for violations of the preference statute would be on a per-transaction basis.

These specific rulings apply to this matter and are binding in this matter as well as in the *Lackey* case.

C. THE RECORD

All exhibits presented by the parties at the hearing held on May 31, 2000, consisting of six separate notebooks were made a part of the record. (See List attached hereto as Exhibit "A"). In addition, all documents, exhibits and witness testimony presented at the hearing held on March 6, 2000 through March 9, 2000 in the *Lackey* case, including the entire trial transcript, were made a part of this record at the specific request of the parties. At the time of the hearing, Green Tree acknowledged there was a Green Tree credit application in the Bazzles' file, wherein Green Tree was directed to provide and include the same as part of the record. The joint Petition for Attorneys Fees relating to the *Lackey* case and this case and supporting Affidavit were made a part of the record, in addition to John P. Freeman, Esquire's live testimony that took place after the award was rendered in this matter.

Finally, the transcript of the hearing in this matter, including all issues addressed subsequent to the close of the hearing is made a part of this record.

D. FINDINGS OF FACT

1. *The Transactions*

The Plaintiffs and all others similarly situated in this case entered into standard form consumer Retail Installment Contracts and Security Agreements (hereinafter "HI-RIC") with Green Tree secured by real property that are subject to the South Carolina Consumer Protection Code. (Notebook 1, Items 9 & 10). The HI-RIC is identified by the alphanumeric Code GT-15-41-010 (11/92). The contracts and agreements entered into by the Plaintiffs and Green Tree were prepared by Green Tree and obligated each consumer to make monthly payments. The HI-RIC makes specific reference to two provisions of the South Carolina Consumer Protection Code. Furthermore, the HI-RIC unequivocally requires the consumer to acquire insurance on the secured realty and list the creditor as a lost payee.

In each of the transactions, the consumer completed a Green Tree application with the assistance of a Green Tree dealer. Green Tree's dealer then submitted the application to Green Tree for approval. (*Id.*). The Green Tree application form contained no attorney preference and insurance preference notice. No separate attorney preference form was provided to the consumer at the time of credit application. Green Tree verified the consumer's employment and income and determined the creditworthiness of the consumer. (*Id*). Green Tree would then notify its dealer if credit was granted. If credit was not approved, Green Tree would notify the consumer directly in writing of the denial of credit. (Notebook 2, Item 23).

The record shows that Green Tree was the "creditor" from the beginning of the transaction. Green Tree was the creditor

before any assignment and before it could claim the status of assignee. If credit was granted, Green Tree alone set the terms of the credit. Green Tree determined the rate of interest. Green Tree determined if the consumer was required to meet any special conditions. Green Tree obtained an appraisal on the real property. Green Tree obtained a title search. Green Tree prepared the HI-RIC. Green Tree prepared the mortgage identified by alphanumeric designation GT-15-41-050 (8/90). Green Tree prepared the HUD-1 Statement which identified Green Tree as the creditor. Green Tree specified on the face of the mortgage that it was to be returned to Green Tree. Green Tree prepared the Right of Recission which identified Green Tree as the creditor. Green Tree forwarded the prepared documents to its dealer. The dealer would then secure the signatures of the consumers. Simultaneously with the closing, the note and mortgage were assigned to Green Tree. Typically, no attorney was present at the time of closing. (Notebook 2, Items 11 & 23). No attorney was involved in the transaction. Green Tree funded the transaction after the consumer had reported satisfaction with the work. Green Tree would then issue checks to its dealers.

2. *Green Tree's Actual Notice of the Attorney and Insurance Agent Preference Statute and Continued Non-Compliance*

This action is not the first time Green Tree has been sued in South Carolina for noncompliance with the preference statute. Prior to the filing of this class action in 1997, Green Tree was involved in several cases involving allegations of a violation of the preference statute with one being of particular interest, *Broomfield v. Green Tree Financial Corp.* (Civil Action No. 94-CP-08-1786).

On December 4, 1994, Robert and Christine Broomfield filed an amended complaint against Green Tree and its agent seeking recovery under a $15,000.00 note and mortgage, including a cause of action for violation of the attorney

preference statute §37-10-102. (Notebook 1, Item 1). At no time during the course of the Broomfield case did Green Tree deny that it failed to adhere to the attorney and insurance agent preference statute. In late November 1996, the case was settled immediately before it was called for trial. Green Tree agreed to pay the [sic] Mr. and Mrs. Broomfield $50,000.00 and further agreed to satisfy the note and mortgage discharging them from any further obligation to Green Tree. Throughout the course of discovery in the *Broomfield* case, Green Tree repeatedly admitted that it did not comply with the attorney and insurance agent preference statute.

In the *Broomfield* case, Donald McConnell, Green Tree's in house counsel, was designated by Green Tree's [sic] as its Rule 30(b)(6) witness. On September 18, 1996, Mr. McConnell's deposition was taken. Mr. McConnell unequivocally admitted that Green Tree failed to properly advise borrowers of their state law right to select their own attorney or insurance agent. Mr. McConnell was completely unaware of the attorney preference requirement and only learned of it through the pending lawsuit[3]. (Notebook 2, Item 17).

Prior to Mr. McConnell's deposition, Keith Troup, a South Carolina manager for Green Tree's Home Improvement Division was deposed by counsel for the Broomfields. Mr. Troup also testified that Green Tree did not have an attorney prepare the mortgage, note, or any other document involved in a real estate secured transaction in the State of South Carolina and that at no time was a consumer provided with notice of the borrower's right to select counsel or an insurance agent. (Notebook 2, Item 23).

The *Broomfield* case clearly establishes that in late 1994 Green Tree had actual notice of the attorney preference

[3] Arbitrator declines to rule on the issue of unauthorized practice of law. Plaintiffs' reserved the right to raise this issue in the original jurisdiction of the South Carolina Supreme Court if any appeal is filed.

statute. Furthermore, it corroborates in this case Green Tree's subsequent wilful non-compliance with the attorney and insurance agent preference statute.

In addition to the *Broomfield* case being instructive, the deposition testimony of Ira Usry, Green Tree's Manufactured Housing Division employee is instructive with regard to Green Tree's cavalier attitude about compliance and its failure to comply with the preference statute. Mr. Usry testified:

On page 15, line 8:

Question: When Green Tree decided to go into that part of the business in South Carolina, were you involved in any way in determining what was necessary to do that properly in terms of the laws of South Carolina and the forms necessary?

Answer: That would be provided by corporate legal and the a.. it area in Saint Paul.

Then on page 19, line 3:

Question: Did you have contact, you personally or anyone at Green Tree from Saint Paul, for that matter, have contact from time to time with any state agencies of South Carolina?

Answer: No.

Then on page 21, line 17:

Question: Do you recall when you personally learned about the . . . learned that there may be some requirement concerning notice to consumers of the right to choose an attorney or the provider of any required insurance of South Carolina?

Answer: I cannot give you the date or the time or the year. I remember that I had someone mention to me that this is something we need to check into. We did so and tried to make the changes from there.

Then on page 22, line 8:

Question: This memo, Exhibit two, is dated September 20, 1995. As far as you know, prior to that time, had anyone at Green Tree made any efforts to inquire into what we referred to?

Answer: I don't think we had knowledge of it.

Then on page 23, line 14:

Question: Before this memo was sent out on September of 1995, you probably already answered this question because you said you didn't have any knowledge of it, but any attorneys that had been involved in any way in any transactions prior to that time, had any of them advised anyone at Green Tree, to your knowledge, that there was any problem with the credit application form or if they had to have an attorney preference notice in the application?

Answer: Never did and at that point we wondered why nobody ever said anything.

Then on page 28, line 7:

Question: How did you learn about the attorney preference requirement?

Answer: I believe we had an employee who carne in one day and said there's a document that we don't have that we need possibly to look into.

Question: Was it that conversation with that employee that led you eventually to issue this memorandum on September 25th?

Answer: I would imagine so, yes.

Question: Did you conduct any investigation after that conversation?

Answer: I think what we did after that conversation, frankly, was call someone and said, tell us about this document and from then on, we contacted probably by memo or by phone or whatever the corporate office and said, we thought we might need to do something here.

Then on page 30, line 13:

Question: Who would you have contacted at corporate?

Answer: I couldn't tell you. We were assigned specific lawyers from time to time. They were inaccessible. So, you would go for anyone. It could have been voice mail.

Question: You were assigned specific lawyers at corporate?

Answer: Yes.

Question: Were these South Carolina lawyers?

Answer: No.

Then on page 32, line 11:

Question: Right. You felt it was something that needed to be done?

Answer: Yes.

Then on page 38, line 2

Question: But they weren't in the practices [sic] of sending you regular updates on South Carolina law?

Answer: No.

Question: Was that their function?

Answer: Their function was to assist us on all legal issues and typically any legal issues in South Carolina for a few lawsuits.

And finally, on page 67, line 1:

Question: To your knowledge, did Green Tree . . . well, I had asked that. Other than your memorandum, did you ever receive any communication from Green Tree?

Answer: Well, no.

Question: Did you ever receive any communication from Green Tree regarding the attorney preference requirement before September 25, 1995?

Answer: Not that I recall.

Green Tree refused to admit that it failed to comply with the attorney and insurance agent preference statute through the date of the filing of the within action; however, it failed to provide any evidence or testimony of compliance.[4] Green Tree offered no forms of compliance. Green Tree offered no memorandum of attempted compliance. Green Tree offered no evidence of any nature that after it was sued by the Broomfields in 1994 that it attempted to comply with the preference statute within its Home Improvement Division. In fact, the Home Improvement Division's Dealers Policies and Procedures Manual, which Green Tree refers to as its "bible," and which was made part of the record here, is void of any instruction or policy to comply with the statute or provide the required disclosure. Furthermore, after Green Tree had undisputed actual knowledge of the statute, it failed to modify, correct or supplement its "bible" to incorporate any compliance procedures or take any other actions reasonably adapted to ensure compliance with the preference statute.

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[4] Green Tree did admit in the *Lackey* case that it did not comply with the attorney and insurance agent preference statute: It is not disputed that in a large number of credit sales contracts acquired by Green Tree prior to 1995, the attorney and insurance agent preference requirement as impounded in *Tilley*, was not complied with. Memoranda of Green Tree Financial Corporation dated June 25, 1999, p.3.

After learning of the preference statute, Green Tree did nothing. It failed to provide the notice. It failed to use attorneys for the transactions. After five suits, including this one, having been brought against Green Tree for failing to comply with the preference statute, it still continued to refuse to take any action or to adhere to the statute's requirements. In fact, Plaintiffs presented the affidavit of Kristen Learnard, whom stated under oath that she was not given the preference notice or form with regard to a closing, that took place seven months after this action was filed. Thus, based on the testimony and the evidence of record, I find that Green Tree simply chose to totally ignore the law despite learning of the requirement. As a result of its behavior, Green Tree's conduct rises to a shocking level of callous and reckless indifference to the rights of South Carolina residents.

3. *Class Members*

At the time of the hearing, Green Tree was instructed to produce a list of all class members and the date that each transaction was entered. (See Attachment B, incorporated herein by specific reference). The list reveals a total of 1,911 class members. Of the 1,911, twelve (12) elected to opt out of the class. (Notebook 4, Item 57; Transcript of May 31, 2000 Hearing, Exhibit 2) Of the remaining 1,899 class members, 1,323 of the transactions were entered into prior to September 25, 1995, and 576 were entered into on or after September 25, 1995. Green Tree was given thirty (30) days to provide a list of any additional members which should be taken out of the class and the factual basis for its position. Green Tree has not provided such a list or basis; therefore, it has waived any right to do so, resulting in the total number of class members in this matter of 1,899.

E. CONCLUSIONS OF LAW

1. *Violations of and Liability under the Attorney Preference Statute.*

Based upon the ruling of the South Carolina Supreme Court in *Tilley v. Pacesetter*, 333 S.C. 33, 508 S.E.2d 16 (1998) and the facts shown on the record in this case, Plaintiffs are entitled, as a matter of law, to a decision that Green Tree is liable for violating S.C. Code Ann. § 37-10-102(a).

As a major corporation doing business in South Carolina for an extended period of time, Green Tree, based on its continuing non-compliance with the preference statute, has demonstrated a complete indifference to its legal obligations to adhere to South Carolina's statutory requirement. Despite Green Tree's vast financial resources, it took no affirmative action to educate itself on the requirements of South Carolina's attorney preference statute. Green Tree's former chief counsel, Mr. Evans, testified that he was responsible for Green Tree's legal compliance. Mr. Evans testified that he was "not aware of the attorney and insurance agent preference statute prior to 1995."

All the testimony and evidence presented at the arbitration hearing clearly shows an ongoing pattern and practice of a disregard for the applicable South Carolina law. The pattern and practice began as a careless or negligent attitude and graduated into wilful non-compliance and a disregard for South Carolina law. While Plaintiffs as a class did not attempt to show actual damages, certainly the plaintiffs suffered injury and loss of their state law right to be advised of their attorney and insurance agent preference. Plaintiffs were denied any knowledge of this important provision of South Carolina law, which the Legislature chose to enact and reenact for many years. I find that Plaintiffs in this class were harmed even to the extent that it is difficult to put a dollar figure on their injury. One of the factors that the Arbitrator must pursue and examine is the attitude and conduct of the

defendant in determining the appropriate penalty in the range provided by S.C. Code Ann. §37-10-105. With regard to an appropriate penalty, the arbitrator should look at the totality of the circumstances. That decision can not be made in a vacuum. The case law says that the requirements of a penal statute must be applied in a manner which results in fairness and justice to the parties. The record reflects that the consumer lending industry is becoming more and more significant in South Carolina. As a matter of public policy, the General Assembly intended to protect consumers in secured transactions of this nature when it placed the preference statute in the South Carolina Consumer Protection Code. The record in this case reflects that Green Tree did have corporate legal counsel and yet no reasonable or direct efforts were taken by Green Tree or his staff to:

(1) Learn of the South Carolina attorney and insurance preference statutory provision; and

(2) More importantly, once it came to Green Tree's attention, to take some affirmative action to bring Green Tree into compliance with the provisions of the statute.

The real question becomes: What did Green Tree do once it was on notice of the preference statute? The answer to that question is one of the most disturbing and shocking aspect [sic] of this case. Green Tree did nothing. Green Tree did nothing after repeatedly being directly made aware of the statute.

Contrary to the position of Green Tree, this case is far worse than the related case of *Lackey*. Green Tree's Home Improvement Division learned of the preference statute by virtue of the Broomfield suit filed in 1994. It is shocking to learn that Green Tree, one of the leaders in the industry, after being sued and having to pay substantial damages, made no effort to comply. Green Tree's Home Improvement Division at no time issued a policy statement. Green Tree did nothing

to educate its employees or dealers. Green Tree's Home Improvement Division merely went about its business, unlike the Manufactured Housing Division, which at least issued a memo about compliance to some of its personnel.

After hearing all the testimony and reviewing all the evidence and considering all the relevant factors in accessing an appropriate penalty, I find and conclude as a matter of law that Green Tree's behavior up to September 25, 1995 was careless and reckless and that the appropriate penalty in this case, as in the *Lackey* case, is $5,000.00 per transaction for transactions occurring prior to September 25, 1995. Based upon Green Tree's shocking course of wilful non-compliance and the fact that it blatantly chose to virtually ignore South Carolina law after September of 1995, I find and conclude as a matter of law that the appropriate penalty in this case is $7,500.00 per transaction for transactions occurring on or after September 25, 1995. The record reflects that there were 1,323 transactions entered into prior to September 25, 1995 and 576 transactions entered into after September 25, 1995. Thus, I award a total of Ten Million Nine Hundred Thirty-five Thousand and No/100 ($10,935,000.00) Dollars to the Plaintiffs in this matter.

2. *Prejudgement Interest*

Plaintiffs moved to recover pre-judgement interest on the award rendered in this case. I conclude Plaintiffs are not entitled to pre-judgement interest.

3. *Attorneys fees.*

Attorney's Fees and Costs

Having determined that the Defendant is liable to the Plaintiff Class for its class-wide violations of the South Carolina attorney and insurance agent preference requirement, I now turn to the issue of attorney's fees. Section 37-5-202(8) of the South Carolina Consumer Protection Code

provides for the awarding of reasonable attorney's fees and costs to prevailing plaintiffs, to be assessed against the defendants. *Freeman v. A&M Mobile Home Sales, Inc.*, 293 S.C. 255, 359 S.E.2d 532 (Ct. App. 1987). Accordingly, the Plaintiff Class herein is entitled to recover reasonable attorney's fees and costs to be assessed against Green Tree in addition to the penalty to be paid to class members.

Plaintiffs Class Counsel have submitted a petition for fees and costs requesting that the Arbitrator award attorney's fees amounting to one-third the gross recovery generated for the benefit of the Plaintiffs Class. They have also submitted their hourly rates for non-contingent legal work paid on a prompt and regular basis. The Arbitrator has carefully reviewed the Plaintiffs Class' fee petition and supporting documentation, including the affidavit of Professor John P. Freeman, who also testified at this hearing as an expert witness in the *Lackey* case and in this case in the field of attorney's fees in the specific context of class actions. Professor Freeman was designated an expert in this field without objection. After this hearing and cross examination by Green Tree of Professor Freeman, Green Tree filed with the Arbitrator certain documents in opposition to the Plaintiff Class's fee petition including the affidavit of attorney William L. Pope opposing the requested attorney's fees. The Arbitrator has carefully and thoroughly reviewed these materials submitted by Green Tree and the hourly rate information provided by Class counsel.

South Carolina has no reported appellate cases in which attorney's fees sought by prevailing plaintiffs in a class action were contested. Nonetheless, the South Carolina Supreme Court has established certain factors which should be considered in awarding attorneys fees.

The general rule is that attorney's fees are not recoverable unless authorized by contract or statute. *Hegler v. Gulf Ins. Co.*, 270 S.C. 548, 243 S.E.2d 443 (1978). In the instant case, S.C. Code Ann. §37-5-202(8) authorizes an award of reasonable attorney's fees and costs to the Plaintiffs' class, who prevailed in this arbitration proceeding. In deciding the amounts of attorney's fees and costs to be awarded, the Arbitrator should consider each of the following six factors: the nature, extent and difficulty of the services rendered; the time and labor necessarily devoted to the case; the professional standing of counsel; the contingency of compensation; the fee customarily charged in the locality for similar legal services; and the beneficial results obtained. Numerous recent cases decided by the South Carolina Supreme Court confirm that each of these factors must be reviewed and considered in determining the reasonableness of an attorney's fee to be awarded to a prevailing plaintiff pursuant to contract or statute. *See Global Protection Corp. v. Halbersberg*, 332 S.C. 149, 160, 503 S.E.2d 483, 489 (1998) and *Taylor v. Medenica*, 331 S.C. 575, 503 S.E.2d 458 (1998) (recovery of fees provided under South Carolina Unfair Trade Practices Act, §39-5-10 *et seq.*); *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997) (recovery of fees provided under Motor Vehicle Dealers Unfair Trade Practices Act, §56-15-10 *et seq.*); *Rice v. Multimedia, Inc.*, 318 S.C. 95, 456 S.E.2d 381 (1995) (recovery of fees provided under South Carolina Payment of Wages Act, §41-10-10, *et seq.*); *Blumberg v. Nealco*, 310 S.C. 492, 427 S.E.2d 659 (1993) and *Baron Data Systems, Inc. v. Loter*, 297 S.C. 382, 377 S.E.2d 296 (1989) (recovery of fees provided by express terms of contract). *See also Freeman v. A&M Mobile Home Sales, Inc.*, 293 S.C. 255, 359 S.E.2d 532 (Ct. App. 1987) (pre-*Baron* Consumer Protection Code case in which fees were awarded under §37-5-202(8) after similar reasonableness analysis consisting of professional standing of plaintiff's attorneys, nature and extent of services rendered, complexity of issues, and beneficial results obtained). The *Baron Data Systems* case instructs that consideration of all six factors is required, but none of the six is controlling in determining the reasonable fee to be awarded. *Baron Data Systems, supra*. As Judge

Goolsby observed in *Freeman v. A&M Mobile Home Sales, Inc.*, 293 S.C. 255, 359 S.E.2d 532 (Ct. App. 1987), a Consumer Protection Code case in which the Court of Appeals affirmed a fee award pursuant to the same statute relied upon by these Plaintiffs, "the measure of proper attorney's fees to be assessed against a party is not always the time spent." 293 S.C. at 266, 359 S.E.2d at 538-39. Where a fee award is supported by any competent evidence, an appeal will not prevail. *Baron Data Systems, supra*, citing *Singeton v. Collins*, 251 S.C. 208, 161 S.E.2d 246 (1968).

Professor Freeman is a noted expert in attorney fee awards in class actions. He has testified in courts around the country on the subject.

After consideration of each of the prescribed six factors to establish a reasonable fee award, I find and conclude as follows:

A. *The Nature, Extent, And Difficulty of The Case*

The record in this case clearly reflects that this plaintiff class action has been one of extraordinary difficulty from the outset. One must consider the complexity inherent in all class actions; the fact that the attorney preference law is unique to the South Carolina Consumer Protection Code; the issues surrounding the validity and effect of the arbitration clause; the appeal of the initial Circuit Court order granting class certification; and the ongoing refusal by Green Tree to cooperate with Plaintiffs' Counsel throughout the pendency of the case.

This action was commenced in March 1997, and ultimately sought class-wide relief on behalf of certain customers of Green Tree Financial Corporation and related entities for Green Tree's violation of the attorney and insurance agent preference provisions of the South Carolina Consumer Protection Code. Plaintiffs moved to certify the class. Green Tree moved to compel arbitration pursuant to the arbitration clause

in its retail installment contracts. The Circuit Court first certified the Class, and thereafter, Green Tree continued with its Motion to Compel Arbitration which the Court granted. Green Tree appealed the class certification and the South Carolina Court of Appeals, and the South Carolina Supreme Court dismissed the appeals. Subsequent to the appeals, the matter proceeded forward with numerous motions and hearings, all of which are to numerous to summarize here.

The brief procedural history of the case only outlines part of the story about the difficulty of this case. The consumer finance industry collectively engaged numerous lobbyists during the 1997 legislative session in an all-out effort aimed at retroactively eliminating all class actions brought to enforce the attorney and insurance agent preference law. Counsel was forced to forego undertaking of other fee-paying matters in order to effectively represent the interests of their clients. Professor Freeman expressed his expert opinion that work undertaken by Plaintiffs' counsel was reasonable and benefited class members.

Green Tree compounded the difficulty of the case by refusing to cooperate with Plaintiffs' Counsel's discovery efforts. Counsel for the Plaintiffs were forced to prepare their case using information obtained independently by hiring and training a team of temporary workers to travel to all 46 counties in South Carolina to search public records for data on class members and their transactions. Counsel also sought out and used data obtained in the course of discovery in prior litigation involving Green Tree. Without any cooperation from Green Tree, Counsel located most of the class members and contacted them to informs them of the pendency of the litigation.

I conclude that the fees awarded in this case should fully and adequately reflect consideration of the nature, extent and difficulty of the case.

b. *The Time Necessarily Devoted to the Case*

According to their affidavit, Plaintiffs' Counsel have devoted over 3,300 attorney hours to the handling of this case and the *Lackey* case. This figure does not include any of the approximately 3,000 hours of paralegal or staff time spent in the cases. This time represents a substantial commitment of time directed to obtaining a good result for members of the class.

c. *The Professional Standing of Counsel*

Plaintiffs' Counsel in this case enjoy a high professional standing and are uniquely qualified to represent the Plaintiffs in attorney preference class actions by virtue of their experience in this specialized area of the law.

Steven W. Hamm, Mary S. League, and C. JoAnne Wessinger (Richardson, Plowden, Carpenter & Robinson, P.A.); T. Alexander Beard (Beard Law Offices); D. Michael Kelly, John D. Kassel, Bradford P. Simpson and B. Randall Dong (Suggs & Kelly Lawyers, P.A.); Mary Leigh Arnold (Mary Leigh Arnold, P.A.); Charles L. Dibble (Dibble Law Offices); Charles L.A. Terreni (Terreni Law Firm); C. Richard Kelly (C. Richard Kelly, P.A.) Thomas M. Fryar (Drose Law Firm); and Daniel W. Williams (Bedingfield & Williams) all have been involved in "attorney preference" class action cases. Professor Freeman stated in his affidavit and testimony before me that several of these lawyers "can lay claim to having virtually invented the genre of attorney preference class actions." *See* Freeman Affidavit at Paragraph 26. Apart from the testimony of Professor Freeman, I have also had the opportunity to observe directly the special competence and expertise of Class Counsel in this case over the past two years. I conclude that because of Counsel's substantial and beneficial experience in consumer class actions of this nature and magnitude, they are entitled to additional consideration in deciding attorneys' fees.

d. *Contingency of Compensation*

The Named Plaintiffs in this case all have executed contingency contracts in which they have agreed to a fee of one-third of the recovery. Plaintiff's Counsel have advanced all costs in this litigation without any expectation of reimbursement except in the event of recovery on behalf of the Plaintiff Class. Collectively, Counsel have placed over $36,504.47 at risk in costs advanced in the Green Tree matters, exclusive of any lobbying expenses or the value of the time spent by attorneys and staff members in the handling of this action. Counsel spent over $56,600 for the costs of lobbying to preserve Plaintiffs' cause of action in the General Assembly. A portion of these expenses should be deemed at risk for the purposes of considering the contingent nature of this case.

e. *Beneficial Results Obtained*

The benefit achieved by the Petitioners for the Plaintiff Class in the instant case has an aggregate value in excess of $10.9 Million, exclusive of costs and expenses to be awarded by this Arbitrator. This is especially noteworthy in light of the difficult conditions under which the Plaintiffs' Counsel handled this case.

f. *Customary Legal Fees for Similar Services*

In *Blum v. Stensen*, 465 U.S. 886, 104 S. Ct. 1541(1984), the U.S. Supreme Court held that customary fees for like work are "to be calculated according to the prevailing market rates in the relevant community." 104 S. Ct. at 1547 (emphasis added).

As the South Carolina Supreme Court found in *Global Protection Corp. v. Halbersberg*, 332 S.C. 149, 503 S.E.2d 483 (1998), the customary fee in South Carolina for complex cases accepted on a contingent-fee basis ranges from one-

third to one-half of the gross recovery. While *Global Protection Corp.* was not a class action, its difficulty and complexity make it relevant here.

In the class action context, courts have likewise awarded substantial fees based upon a percentage of recovery. The "relevant community" for like work in this case is that community of class action litigation lawyers involved in complex civil cases. Professor Newberg, cited *supra*, has written that "the relevant community may potentially be the forum, out-of-state forums, or a uniform national rate." Newberg, *supra*, note 23 §414 at 142.

Citing such circumstances as the complexity and expense of class action litigation, multiple parties, and the involvement of "national defendants who normally will be represented by national, as well as local counsel," Professor Newberg states:

> Courts have recognized that these and other circumstances make a local forum rate for compensation . . . an inappropriate and illogical standard, in contrast to . . . the growing adoption by courts of national rate standards.
>
> Newborn, *supra*, note 23 §415 at 143.

Professor Freeman attached to his affidavit in support of the fee request in this case copies of two other recent class action cases in which he testified about fee reasonableness and other issues. In one of these cases, *In re State of Florida v. American Tobacco Co.* (Arbitration Award dated September 11, 1998), the arbitrators awarded plaintiff's counsel a fee of in excess of $3.4 Billion. In the other, *Ramos v. Phillip Morris Companies, Inc.*, 743 So.2d 24 (Fl. App. 1999), the Florida Court of Appeals affirmed a fee award of over $46 Million. These cases illustrate the fact that class counsel are very well compensated when they obtain a substantial benefit for Class members. The reasonableness of attorney fee

awards in class actions should not be confined to any single element such as the number of hours spent in achieving a beneficial result for the class.

The class action cases cited by Professor Freeman and by Class Counsel were virtually all settled, rather than tried. Because this case required the Plaintiffs to brief and argue an appeal and fight off two efforts by Green Tree to stop the litigation with an injunction; engage in an expensive, time-consuming legislative battle; independently gather statewide information without the aid of traditional discovery; and try the case before an arbitrator, they are entitled to a reasonable attorneys fee of $3,645,000.00 in addition to the judgement of $10,935,000.00 obtained on behalf of the Plaintiffs Class.

4. *Unclaimed Funds and Administration of Class*

Counsel for Plaintiffs have requested that any funds awarded to class members who cannot be located after reasonable efforts to locate all intended payees be provided to the South Carolina School of Law, South Carolina Habitat for Humanity, Shriner's Hospital and Global Outreach. After careful consideration, I conclude that the request to distribute unclaimed funds to the above referenced organizations should be granted. Six months after Green Tree tenders the applicable amount referenced above plus any applicable interest, class counsel shall distribute any remaining unclaimed funds by tendering 75% of such funds to the South Carolina School of Law, 9% to the South Carolina Habitat for Humanity, 8% to the Shriner's Hospital and 8% to Global Outreach.

Any interest earned after deposit of the applicable judgement amount, including interest, if any, into Plaintiffs' Counsel trust account may be applied to reasonable administrative costs. In recognition for the named Plaintiffs willing to serve as class representatives and to assist in this case on behalf of all class members, the named Plaintiffs shall receive the distribution noted below. After payment of reasonable

administrative costs, such remaining interest shall be distributed to the Named Class Representatives in an amount not to exceed $50,000, divided equally among the class representatives on a per transaction basis. Any remaining amount after payment of reasonable administrative costs and payment to the named class representatives shall be paid to the Cy Pres. Within 45 days of final distribution of the unclaimed funds Plaintiffs' counsel shall file an accounting with the Court. It is expressly directed that class counsel utilize their best efforts to locate all class members and award them the $5,000 or $7,500.00 referenced in this Order. Any costs associated with efforts to locate class members associated with unclaimed funds shall be deducted from the $5,000 or $7,500 allocated to such class members when located if funds from interest paid into the trust account are not sufficient to cover such costs.

Plaintiffs have also requested that I issue an Order authorizing the Plaintiffs to seek addresses of any class members who cannot be located based upon addresses currently maintained by Class Counsel. Accordingly, I have attached a separate Order authorizing the counsel for Plaintiffs to obtain addresses from credit reporting agencies in accordance with the Federal Credit Reporting Act 15 U.S.C. § 1681b(a)(1).

AWARD

Based upon careful review of the materials, cases, affidavits and testimony presented by counsel for the Plaintiffs and by Green Tree, and applying the relevant precedential authority to the facts and record before me in this case, I have concluded that Green Tree's behavior in this matter was wilful, reckless, wanton and egregious, and therefore, awarded Plaintiffs the sum of $10,935,000.00. I also find the Plaintiffs should be reimbursed and awarded certain reasonable costs associated with the prosecution of this case in

the amount of $18,252 which is one half of $36,504. I further conclude that a reasonable attorneys fee of $3,645,000.00 should be awarded to members of the Plaintiffs' class.

Thus, I conclude that a judgment should be entered against Green Tree in the total amount of $14,598,252.00

IT IS SO AWARDED.

/s/ Tom J. Ervin
Arbitrator TOM J. ERVIN

July 24, 2000

APPENDIX E

IN ARBITRATION
STATE OF SOUTH CAROLINA
COUNTY OF BARNWELL
COURT OF COMMON PLEAS

[Filed Jul 25, 2000]

Civil Action No. 96-CP-06-073

DANIEL B. LACKEY, GEORGE BUGGS, AND FLORINE BUGGS,
in a representative capacity on behalf of a class of
all others similarly situated,
Plaintiffs,

vs.

GREEN TREE FINANCIAL CORPORATION, a/k/a GREEN TREE FINANCIAL SERVICES CORP., a/k/a GREEN TREE ACCEPTANCE CORP. n/k/a CONSECO FINANCE, INC.
Defendant.

FINAL ORDER AND AWARD IN ARBITRATION

I.

This binding class arbitration deals with Green Tree Financial Corporation's (a/k/a Green Tree Acceptance Corporation a/k/a Green Tree Financial Services Corporation n/k/a Conseco Finance, Inc., hereinafter collectively "Green Tree") failure to comply with the attorney and insurance agent preference requirements of the South Carolina Consumer

Protection Code ("Code") in its manufactured home transactions through September 25, 1995.[1]

A. PROCEDURAL HISTORY

This action was commenced by Plaintiffs against Green Tree in the Court of Common Pleas for Barnwell County, South Carolina (Civil Action No. 96-CP-06-073), by the filing of the Summons and Complaint as a class action on May 28, 1996. (Plaintiffs' Exhibit Notebook 2, Item 47 (hereinafter "Notebook")). On July 30, 1996, Green Tree filed an Answer asserting various defenses. (Notebook 2, Item 56). On October 1, 1996, the Plaintiffs filed a Motion for Class Certification pursuant to Rule 23 of the South Carolina Rules of Civil Procedure. In response, Green Tree filed a motion to Stay the Matter and to Compel Arbitration. The Honorable Rodney A. Peeples denied Green Tree's motion to compel arbitration and held that the arbitration clause was unconscionable.

Green Tree appealed Judge Peeples' ruling. The Court of Appeals reversed and remanded the case to the lower court, *Lackey v. Green Tree Financial Corp.*, 330 S.C. 388, 498 S.E.2d 898 (S.C. App. 1998). (Notebook 2, Item 48). On July 23, 1998, the parties entered into a Consent Order entered by

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[1] This original class action consisted of all consumer retail installment transactions secured by real estate located in South Carolina entered into within three years prior to May 28, 1996. At the request of Green Tree, the action was bifurcated into two separate class actions: *Lackey v. Green Tree* (this case) involving manufactured housing transactions prior to September 25, 1995 and *Workman v. Green Tree* involving manufactured housing transactions after September 25, 1995. Subsequently, Green Tree requested that all home improvement transactions be removed from this case, specifically including one of the named plaintiffs, Daniel B. Lackey and joined in the separate action identified as *Bazzle Green Tree*. Green Tree's request was granted. The *Workman* and *Bazzle* cases are now separate class actions and are not addressed in this Order.

Judge Rodney A. Peeples submitting the matter to binding arbitration. (Notebook 2, Item 12).

On August 19, 1998, a hearing was held before this Arbitrator on the issue of whether or not the Plaintiffs' class action could proceed in arbitration. I determined that a class action should proceed in arbitration based upon my careful review of the broadly drafted arbitration clause prepared by Green Tree. Green Tree's binding arbitration clause provides the arbitrator with broad powers. The arbitration clause prepared by Green Tree states:

> ARBITRATION—All disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract, or the validity of this arbitration clause or the entire contract, shall be resolved by binding arbitration by one arbitrator selected by us with consent of you. This arbitration contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. section 1. Judgment upon the award rendered may be entered in any court having jurisdiction. The parties agree and understand that they choose arbitration instead of litigation to resolve disputes. The parties agree and understand that they have a right or opportunity to litigate disputes through a court, but that they prefer to resolve their disputes through arbitration, except as provided herein. THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL, EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO A COURT ACTION BY US (AS PROVIDED HEREIN). The parties agree and understand that all disputes arising under case law, statutory law, and all other laws including, but not limited to, all contract, tort, and property disputes, will be subject to binding arbitration in accord with this

> contract. The parties agree and understand that the arbitrator shall have all powers provided by the law and the contract. These powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief. Notwithstanding anything hereunto the contrary, we retain an option to use judicial or non-judicial relief to enforce a mortgage, deed of trust, or other security agreement relating to the real property secured in a transaction underlying this arbitration agreement, or to enforce the monetary obligation secured by the real property, or to foreclose on the real property. Such judicial relief would take the form of a lawsuit. The institution and maintenance of an action for judicial relief in a court to foreclose upon any collateral, to obtain a monetary judgment or to enforce the mortgage or deed of trust, shall not constitute a waiver of the right of any party to compel arbitration regarding any other dispute or remedy subject to arbitration in this contract, including the filing of a counterclaim in a suit brought by us pursuant to this provision.

On September 22, 1998, Green Tree initiated a declaratory judgment action in federal court and filed a Motion for Preliminary Injunction asserting federal jurisdiction and seeking to prohibit the Arbitrator from certifying a class in arbitration. *Green Tree Financial Corp. v. Lackey, et al.*, Case No. 3:98-2750-17 (D.S.C. 1998). After a hearing, the Honorable Joseph F. Anderson, Jr. denied Green Tree's Motion and dismissed Green Tree's declaratory judgment action for lack of subject matter jurisdiction. (Notebook 2, Item 18).

On November 23, 1998, a hearing on Plaintiffs' Motion for Class Certification was held before the Arbitrator. Green Tree's counsel attended the hearing but declined to participate in the argument of the Motion even though Green Tree and its

counsel acknowledged that Green Tree had been given adequate notice and an opportunity to be heard. The Arbitrator found that the requirements for class certification were met and that class certification was appropriate. (Notebook 2, Item 49).

On December 4, 1998, Green Tree filed another declaratory judgment action and petition for injunction in State Court in Barnwell County as Civil Action 98-CP-06-278. (Notebook 2, Item 41). Simultaneous with filing the declaratory action in State Court, Green Tree also filed its Motion to Stay the arbitration proceedings. On January 6, 1999, The Honorable Gary E. Clary held a hearing on Green Tree's motion to stay these arbitration proceedings and denied Green Tree's Motion to Stay.

B. RULINGS BINDING IN THIS CASE.

On August 19, 1999, the parties to this arbitration presented memorandums and oral arguments to the Arbitrator on several issues. At the conclusion of oral argument, the Arbitrator advised the parties of his determination of the following issues:

1. The remedy for violations of the attorney and insurance agent preference statute is provided in South Carolina Code Ann. Section §37-10-105 as amended by the General Assembly in 1997.
2. Green Tree was the "creditor" for the manufactured housing transactions it funded and was subject to the preference requirements contained in S.C. Code Ann. §37-10-102(a).
3. Even if Green Tree was an "assignee" for purposes of the Code, Plaintiffs were not required to engage in a futile act by asking dealers to ascertain the preference of debtors after the credit transaction was already closed and finalized.

4. Green Tree was judicially estopped from asserting any claim that Green Tree Financial Corporation was not the proper party in interest.
5. Green Tree Financial Services Corporation was liable for the acts and omissions of Green Tree Financial Corporation.
6. Transactions closed outside of the state of South Carolina would not be included in the certified class.
7. Any penalty assessed by the Arbitrator for violations of the preference statute would be on a per-transaction basis.

On January 28, 2000, a pre-trial conference was held. At the time of the conference the parties entered into a Consent Agreement bifurcating the case, and postponing trial for all class members with contracts dated after September 25, 1995 for a later arbitration proceeding. (Notebook 2, Item 50). The Consent Agreement also postponed trial for class members with home improvement contracts secured by real estate, which is now identified as *Bazzle v. Green Tree,* (See Footnote 1).

C. THE RECORD

The record in this case is attached to this Order and is identified as Exhibit 1.

D. FINDINGS OF FACT

1. *The Transactions.*

The Plaintiffs and all others similarly situated in this case entered into standard form consumer installment contracts and security agreements with Green Tree secured by real property that are subject to the South Carolina Consumer Protection Code. (See Notebook 1, Items 9 & 10). The contracts and agreements entered into by the Plaintiffs and Green Tree were prepared by Green Tree and obligated each

consumer to make monthly payments. In each of the transactions, the consumer completed a Green Tree application with the assistance of a Green Tree dealer. Green Tree's dealer then submitted the application to Green Tree for approval. (*Id.*). The Green Tree application forms contained no attorney and insurance agent preference notice. No separate attorney and insurance agent preference form was provided to the consumer at the time of credit application. Green Tree verified the consumer's employment and income and determined the creditworthiness of the consumer. (*Id.*). Green Tree would then notify its dealer if credit was granted. If credit was not approved, Green Tree would notify the consumer directly in writing of the denial of credit. (Notebook 1, Item 3, Usry Affidavit).

The record shows that Green Tree was the "creditor" from the beginning of the transaction. Green Tree was the creditor before any assignment and before it could claim the status of assignee. If credit was granted, Green Tree alone set the terms of the credit. Green Tree determined the rate of interest. Green Tree determined if the consumer was required to meet any special conditions. Green Tree obtained an appraisal on the real property. Green Tree obtained a title search. Green Tree prepared the installment note. Green Tree prepared the mortgage. Green Tree specified on the face of the mortgage that it was to be returned to Green Tree. Green Tree forwarded the prepared documents to its dealer. The dealer would then secure the signatures of the consumers. Simultaneously with the closing, the note and mortgage were assigned to Green Tree. Typically, no attorney was present at the time of closing. (Notebook 2, Items 11 & 23). Green Tree funded the transaction after the consumer had reported satisfaction with the set up of the home. Green Tree would then issue checks to its dealers. (Notebook 1, Item 3).

2. *Green Tree Had Actual Notice of the Attorney and Insurance Agent Preference Statute*

This is not the first time Green Tree has been sued in South Carolina for noncompliance with the preference statute. Prior to the filing of this case in 1996 and the subsequent class certification, Green Tree was named in one of the first cases involving allegations of a violation of the preference statute. *Broomfield v. Green Tree Financial Corp.* (Civil Action No. 94-CP-08-1786).

On December 4, 1994, Robert and Christine Broomfield filed an amended complaint against Green Tree and its agent seeking recovery under a $15,000.00 note and mortgage, including a cause of action for violation of the attorney and insurance agent preference statute §37-10-102. (Notebook 2, Item 57). At no time during the course of the *Broomfield* case did Green Tree deny that it failed to adhere to the attorney and insurance agent preference statute. In late November 1996, the case was called for trial. The morning the jury was selected, the case was settled. Green Tree agreed to pay Mr. and Mrs. Broomfield the sum of $50,000.00 and further agreed to satisfy the note and mortgage discharging them from any further obligation to Green Tree. Throughout the course of discovery in this case, Green Tree repeatedly acknowledged that it did not comply with the attorney and insurance agent preference statute.

In the *Broomfield* case, Donald McConnell, Green Tree's in house counsel, was designated by Green Tree's [sic] as its Rule 30(b)(6) witness. On September 8, 1996, Mr. McConnell's deposition was taken. Mr. McConnell unequivocally admitted that Green Tree failed to properly advise borrowers of their state law right to select their own attorney or insurance agent. Mr. McConnell was completely unaware of the attorney and insurance agent preference requirement and only learned of it through the pending lawsuit. (Notebook 2, Item 17).

Prior to Mr. McConnell's deposition, Keith Troup, a South Carolina manager for Green Tree was deposed by counsel for the Broomfields. Mr. Troup testified that at no time was a consumer provided with notice of the borrower's right to select counsel or an insurance agent. (Notebook 2, Item 23).

The *Broomfield* case clearly establishes that in late 1994 that Green Tree had actual notice of the attorney and insurance agent preference statute. Furthermore, it corroborates Green Tree's admission in this case that it did not comply with the attorney and insurance agent preference statute:

> It is not disputed that in a large number of credit sales contracts acquired by Green Tree prior to 1995, the "attorney and insurance agent preference" requirement as expounded in *Tilley* was not complied with.
>
> Memorandum of Green Tree Financial Corporation dated June 25, 1999, p.3

Green Tree does not argue that it complied with the attorney and insurance agent preference statute prior to September 25, 1995. Green Tree does not deny that it did not have policies or procedures relating to the attorney and insurance agent preference statute prior to September 25, 1995.

E. CLASS MEMBERS

Green Tree does not dispute that, originally, there were 1,964 loans or transactions involved in the present proceeding with absolutely no evidence of compliance with the preference statute. The present class now consists of 1,840 transactions after transferring 73 transactions with no arbitration clause to the *Green Tree v. Flemmings* case, which was certified as a class action by Judge McKellar on April 26, 2000. An additional 36 transactions were removed from the class pursuant to my ruling that transactions closed outside of

South Carolina would not remain in the instant class. Five transactions with some evidence of an attorney and insurance preference form were moved to the *Workman v. Green Tree* case referenced in footnote 1 of this Order. An additional 10 transactions were removed as a result of opt-outs by the affected consumers. (Notebook 4, Item 57; Transcript of May 31, 2000 Hearing, Exhibit 2) A list of the remaining 1,840 class members are attached as Exhibit 2 to this Order. Green Tree was given thirty (30) days to provide a list of any additional members which should be taken out of the class and the factual basis for its position. Green Tree has not provided such a list or basis; therefore, it has waived any right to do so. I have retained jurisdiction over the *Workman* class and this Order does not address issues in that case.

3. CONCLUSIONS OF LAW

Based upon the ruling of the South Carolina Supreme Court in *Tilley v. Pacesetter,* 333 S.C. 33, 508 S.E.2d 16 (1998) and the facts shown on the record in this case, Plaintiffs are entitled as a matter of law, to a decision that Green Tree is liable for violating S.C. Code Ann. Section 37-10-102(a).

As a major corporation doing business in South Carolina for an extended period of time, Green Tree, based on its continuing non-compliance with the preference statute, has demonstrated a complete indifference to its legal obligations to adhere to South Carolina's statutory requirement. Despite Green Tree's vast financial resources, it took no affirmative action to educate itself on the requirements of South Carolina's attorney preference statute. Green Tree's former Chief Counsel, Richard G. Evans, testified that he was responsible for Green Tree's legal compliance. Mr. Evans testified that he was "not aware of the attorney and insurance agent preference statute prior to 1995."

The attorney and insurance agent preference statute, enacted in the South Carolina Consumer Protection Code in 1982, first came to the attention of Green Tree's corporate counsel based on information obtained from a local employee in the South Carolina office in 1995. The deposition testimony of Ira Usry is instructive in looking at Green Tree's continuing failure to comply with the preference statute:

On page 15, line 8:

Question: When Green Tree decided to go into that part of the business in South Carolina, were you involved in any way in determining what was necessary to do that properly in terms of the laws of South Carolina and the forms necessary?

Answer: That would be provided by corporate legal and the audit area in Saint Paul.

Question: You didn't have the legal department or legal access of South Carolina inside of Green Tree?

Answer: No. All that was handled by corporate people.

Then on page 19, line 3:

Question: Did you have contact, you personally or anyone at Green Tree from Saint Paul, for that matter, have contact from time to time with any state agencies of South Carolina?

Answer: No.

Then on Page 21, line 17:

Question: Do you recall when you personally learned about the . . . learned that there may be some requirement concerning notice to consumers of the right to choose an attorney or the provider of any required insurance of South Carolina?

Answer: I cannot give you the date or the time or the year. I remember that I had someone mention to me that this is something we need to check into. We did so and tried to make the changes from there.

Then on Page 22, line 8:

Question: This memo, Exhibit Two, is dated September 25, 1995. As far as you know, prior to that time, had anyone at Green Tree made any efforts to inquire into what we referred to?

Answer: I don't think we had knowledge of it.

Then on Page 23, line 14:

Question: Before this memo was sent out on September of 1995, you probably already answered this question because you said you didn't have any knowledge of it, but any attorneys that had been involved in any way in any of the transactions prior to that time, had any of them advised anyone at Green Tree, to your knowledge, that there was any problem with the credit application form or if they had to have an attorney preference notice in the file?

Answer: Never did and at that point we wondered why nobody ever said anything.

Then on Page 28, line 7:

Question: How did you learn about the attorney preference requirement?

Answer: I believe we had an employee who came in one day and said there's a document that we don't have that we need possibly to look into.

Question: Do you remember who that employee was?

Answer: No, not specifically, no.

Question: Would it have been a subordinate of yours?

Answer: Yes.

Question: Was it that conversation with that employee that led you eventually to issue this memorandum on September 25th?

Answer: I would imagine so, yes.

Question: Did you conduct any investigation after that conversation?

Answer: I think what we did after that conversation, frankly, was call someone and said, tell us about this document and from then on, we contacted probably by memo or by phone or whatever the corporate office and said, we thought we might need to do something here.

Then on Page 30, line 13:

Question: Who would you have contacted at corporate?

Answer: I couldn't tell you. We were assigned specific lawyers from time to time. They were inaccessible. So, you would go for anyone. It could have been voice mail.

Question: You were assigned specific lawyers at corporate?

Answer: Yes.

Question: Were these South Carolina lawyers?

Answer: No.

Then on Page 32, line 11:

Question: Right. You felt it was something that needed to be done?

Answer: Yes.

Question: But if I understand your job at Green Tree, compliance was not necessarily sort of legal compliance with closing procedures. It was not part of your job responsibility, was it?

Answer: I wasn't to determine what documents would be used in closing.

Question: But nevertheless, this was important enough to do it?

Answer: We tried to do the right thing.

Then on Page 38, line 2:

Question: But they weren't in the practice of sending you regular updates on South Carolina law?

Answer: No.

Question: Was that their function?

Answer: Their function was to assist us on all legal issues and typically any legal issues in South Carolina for a few lawsuits.

I have considered the record and evidence in this case with regard to issue of Green Tree acting as the "creditor" in conjunction with its real estate secured transactions. The deposition testimony of Mr. Usry is also instructive and important. On Page 58, line 2, regarding the issue of whether Green Tree was acting as "creditor":

Answer: We had control of the credit. We had control to the point we would cut a check when we thought things were the way they should be.

Then on Page 58, Line 9:

Question: You certainly had control of the application process.

Answer: If you want to call it control. We took the application that was submitted to us and we made a decision.

Question: It was your decision and your discretion to submit or reject?

Answer: To approve or deny credit, yes.

And finally, on page 67, line 1:

Question: To your knowledge, did Green Tree . . . well, I had asked that. Other than your memorandum, did you ever receive any communication from Green Tree?

Answer: Well, no.

Question: Did you ever receive any communication from Green Tree regarding the attorney preference requirement before September 25, 1995?

Answer: Not that I recall.

All the testimony and evidence presented clearly shows an ongoing pattern and practice of disregard for the applicable South Carolina law. That pattern and practice began as a careless or negligent attitude. One of the factors that the Arbitrator must examine is the attitude and conduct of the defendant in determining an appropriate penalty.

While the plaintiffs as a class did not attempt to show actual damages, certainly the plaintiffs suffered injury and loss of their state law right to be advised of their attorney and insurance agent preference. Plaintiffs were denied any knowledge of this important provision of South Carolina law, which the Legislature chose to enact and reenact for many years. I find that plaintiffs in this class were harmed, even if it is difficult put a dollar figure on their injury. I must look to the attitude and conduct of the defendants and their total failure to comply in establishing an appropriate penalty in the range provided by S.C.. Code Ann. § 37-10-105. As a matter of public policy, the General Assembly intended to protect consumers in secured transactions of this nature when it placed the preference statute in the South Carolina Consumer Protection Code.

With regard to an appropriate penalty, the arbitrator should look at the totality of the circumstances. That decision cannot

be made in a vacuum. The case law says that the requirements of the penal statute must be applied in a manner which results in fairness and justice to the parties. The record in this case reflects that Green Tree did have corporate legal counsel and yet no reasonable or direct efforts were taken by Mr. Evans or his staff to:

1) learn of the South Carolina attorney and insurance agent preference statutory provision, and

2) More importantly, once it came to Green Tree's attention, to take some affirmative action to bring Green Tree into compliance with the provisions of the statute.

Surprisingly, one of Green Tree's regional managers had to learn about the preference requirement from a subordinate employee. It is shocking to learn that Green Tree, one of the leaders in the lending industry, took such a casual approach to this important legal requirement so as to only stumble upon it after a local employee brought it to the regional manager's attention. I find that Green Tree was negligent and careless. This inquiry must go another step and look at the totality of the circumstances. The real question then becomes: What did Green Tree do once it finally learned about the preference statute? The answer to that question is the most shocking and disturbing aspect of this case. While Green Tree presented testimony about a policies and procedures manual, Green Tree did not introduce a policies and procedures manual that addressed the steps needed to comply with the preference statute.

Mr. Evans testified that had Green Tree known about the preference statute, it would have complied by providing its consumer borrowers with the necessary forms. However, ignorance of the law is neither an excuse nor a defense. Therefore, a penalty is appropriate in this case to punish Green Tree for its non-compliance and its willful failure to

take the necessary steps to comply once it learned of the non-compliance through its local office in South Carolina. Mr. Evans testified that South Carolina was a "high user state" in terms of the manufactured housing business. However, Mr. Evans was unable to produce any written record to show that any attorney opinion was ever requested on compliance with the attorney preference statute. Mr. Evans admitted, "Maybe our standards are too low. I wish we had known earlier. We tried to comply (Notebook 6, Item 37; Transcript of March 6, 7 & 8, 2000 Hearing, p. 340)." The record in this case reveals no Green Tree efforts to actually comply with the law prior to September 25, 1995.

After hearing all the testimony and reviewing all the evidence and considering the relevant factors in accessing an appropriate penalty, I find and conclude as a matter of law that the reasonable and appropriate penalty in this case is $5,000 per transaction for transactions entered through September 25, 1995. Having determined that the class members in this case number 1,840, the penalty to be awarded is $9,200,000.00.

F. PRE-JUDGMENT INTEREST

Plaintiffs moved to recover pre-judgment interest on the award rendered in this case. I conclude Plaintiffs are not entitled to pre-judgment interest.

G. ATTORNEY'S FEES AND COSTS

Having determined that the Defendant is liable to the Plaintiff Class for its class-wide violations of the South Carolina attorney and insurance agent preference requirement, I now turn to the issue of attorney's fees. Section 37-5-202(8) of the South Carolina Consumer Protection Code provides for the awarding of reasonable attorney's fees and costs to prevailing plaintiffs, to be assessed against the defendants. *Freeman v. A&M Mobile*

Home Sales, Inc., 293 S.C. 255, 359 S.E.2d 532 (Ct. App. 1987). Accordingly, the Plaintiff Class herein is entitled to recover reasonable attorney's fees and costs to be assessed against Green Tree in addition to the penalty to be paid to class members.

Plaintiff Class Counsel have submitted a petition for fees and costs requesting that the Arbitrator award attorney's fees amounting to one-third the gross recovery generated for the benefit of the Plaintiff Class. They have also submitted their hourly rates for non-contingent legal work paid on a prompt and regular basis. The Arbitrator has carefully reviewed the Plaintiff Class's fee petition and supporting documentation, including the affidavit of Professor John P. Freeman, who also testified after the *Bazzle* hearing before me as an expert witness for the *Lackey* and *Bazzle* cases in the field of attorney's fees in the specific context of class actions. Professor Freeman was designated an expert in this field without objection. Professor Freeman is a noted expert in attorney fee awards in class actions. He has testified in courts around the country on the subject. After the *Bazzle* hearing and Green Tree's cross examination of Professor Freeman, Green Tree filed certain documents in opposition to the Plaintiff Class's fee petition including the affidavit of attorney William L. Pope opposing the requested attorney's fees. The Arbitrator has carefully and thoroughly reviewed the materials submitted by Green Tree and the hourly rate information provided by Class Counsel.

South Carolina has no reported appellate cases in which attorney's fees sought by prevailing plaintiffs in a class action were contested. Nonetheless, the South Carolina Supreme Court has established certain factors which should be considered in awarding attorneys fees. The general rule is that attorney's fees are not recoverable unless authorized by contract or statute. *Hegler v. Gulf Ins. Co.*, 270 S.C. 548, 243 S.E.2d 443 (1978). In the instant case, S.C. Code Ann. §37-5-

202(8) specifically authorizes an award of reasonable attorney's fees and costs to the Plaintiff class, who prevailed in this arbitration proceeding. In deciding the amounts of attorney's fees and costs to be awarded, the Arbitrator should consider each of the following six factors: the nature, extent and difficulty of the services rendered; the time and labor necessarily devoted to the case; the professional standing of counsel; the contingency of compensation; the fee customarily charged in the locality for similar legal services; and the beneficial results obtained. Numerous recent cases decided by the South Carolina Supreme Court confirm that each of these factors must be reviewed and considered in determining the reasonableness of an attorney's fee to be awarded to a prevailing plaintiff pursuant to contract or statute. *See Global Protection Corp. v. Halbersberg,* 332 S.C. 149, 160, 503 S.E.2d 483, 489 (1998) and *Taylor v. Medenica,* 331 S.C. 575, 503 S.E.2d 458 (1998) (recovery of fees provided under South Carolina Unfair Trade Practices Act, §39-5-10 *et seq.*); *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997) (recovery of fees provided under Motor Vehicle Dealers Unfair Trade Practices Act, §56-15-10 *et seq.*); *Rice v. Multimedia, Inc.*, 318 S.C. 95, 456 S.E.2d 381 (1995) (recovery of fees provided under South Carolina Payment of Wages Act, §41-10-10, *et seq.*); *Blumberg v. Nealco,* 310 S.C. 492, 427 S.E.2d 659 (1993) and *Baron Data Systems, Inc. v. Loter,* 297 S.C. 382, 377 S.E.2d 296 (1989) (recovery of fees provided by express terms of contract). *See also Freeman v. A&M Mobile Home Sales, Inc.*, 293 S.C. 255, 359 S.E.2d 532 (Ct. App. 1987) (pre-*Baron* Consumer Protection Code case in which fees were awarded under §37-5-202(8) after similar reasonableness analysis consisting of professional standing of plaintiff's attorneys, nature and extent of services rendered, complexity of issues, and beneficial results obtained). The *Baron Data Systems* case instructs that consideration of all six factors is required, but none of the six is controlling in determining the reasonable

fee to be awarded. *Baron Data Systems, supra.* As Judge Goolsby observed in *Freeman v. A&M Mobile Home Sales, Inc.*, 293 S.C. 255, 359 S.E.2d 532 (Ct. App. 1987), a Consumer Protection Code case in which the Court of Appeals affirmed a fee award pursuant to the same statute relied upon by Plaintiffs, "the measure of proper attorney's fees to be assessed against a party is not always the time spent." 293 S.C. at 266, 359 S.E.2d at 538-39. Where a fee award is supported by any competent evidence, an appeal will not prevail. *Baron Data Systems, supra,* citing *Singleton v. Collins*, 251 S.C. 208, 161 S.E.2d 246 (1968).

After consideration of each of the prescribed six factors to establish a reasonable fee award, I find and conclude as follows:

1. *The Nature, Extent, And Difficulty of The Case*

The record in this case clearly reflects that this plaintiff class action has been one of extraordinary difficulty from the outset. One must consider the complexity inherent in all class actions; the fact that the attorney preference law is unique to the South Carolina Consumer Protection Code; the issues surrounding the validity and effect of the arbitration clause; the appeal of the initial Circuit Court order finding the arbitration clause unconscionable and unenforceable; the unique issues raised in the case relating to class arbitration; and the ongoing refusal by Green Tree to cooperate with Plaintiffs' Counsel on discovery and other matters.

This class action was commenced in May 1996, seeking class-wide relief on behalf of certain customers of Green Tree Financial Corporation and related entities for Green Tree's violation of the attorney and insurance agent preference provisions of the South Carolina Consumer Protection Code. Green Tree moved to compel arbitration pursuant to the arbitration clause in its retail installment contracts. The Circuit Court issued its order finding that the arbitration

clause was unconscionable and therefore unenforceable. Green Tree appealed, and the South Carolina Court of Appeals, in *Lackey v. Green Tree Financial Corp.*, 330 S.C. 388; 498 S.E.2d 898 (1998), reversed and remanded this class action to the Circuit Court for referral to arbitration. At that time, the parties consented to Arbitration pursuant to the Court of Appeals Order and chose this Arbitrator to hear the case (Notebook 5, Item 15). After the case was referred to arbitration, the Plaintiffs continued to move for class certification. The Arbitrator, after reviewing the broad language in the arbitration clause and considering all matters raised by Green Tree, certified the class in the arbitration proceeding. Green Tree contested the Arbitrator's power to certify and adjudicate the class. In September 1998, Green Tree filed an action in the United States District Court for the District of South Carolina seeking a temporary injunction halting the adjudication of this lawsuit as a class action. The Plaintiffs successfully defended against the injunction in the federal forum on the ground of lack of subject-matter jurisdiction. Thereafter, in December 1998, Green Tree sued the Plaintiffs in the Circuit Court, again seeking to enjoin the Arbitrator from adjudicating this case as a class action. The Plaintiffs again were successful in defending against Green Tree's procedural attempts to thwart their efforts on behalf of the class, and the case proceeded to trial before the Arbitrator in March of 2000.

The brief procedural history of the case only outlines part of the story about the difficulty of this case. The consumer finance industry collectively engaged numerous lobbyists during the 1997 legislative session in an all-out effort aimed at retroactively eliminating all class actions brought to enforce the attorney and insurance agent preference law. Counsel was forced to forego undertaking of [sic] other fee-paying matters in order to effectively represent the interests of their clients. Professor Freeman expressed his expert

opinion that the work undertaken by Plaintiffs' Counsel was reasonable and benefited class members.

Green Tree compounded the difficulty of the case by refusing to cooperate with Plaintiffs' Counsel's discovery efforts. Counsel for the Plaintiffs were forced to prepare their case using information obtained independently by hiring and training a team of workers to travel to all 46 counties in South Carolina to search public records for data on class members and their transactions. Counsel also sought out and used data obtained in the course of discovery in prior litigation involving Green Tree. Without cooperation from Green Tree, Counsel located most of the class members and began contacting them to inform them of the pendency of the litigation.

I conclude that the fees awarded in this case should fully and adequately reflect consideration of the nature, extent and difficulty of the case.

2. *The Time Necessarily Devoted to the Case*

According to their affidavits, Plaintiffs' Counsel have devoted over 3,300 attorney hours to the handling of this case and the *Bazzle* case. This figure does not include any of the approximately 3,000 hours of paralegal or staff time spent in the case. This time represents a substantial commitment of time directed to obtaining a good result for members of the class.

3. *The Professional Standing of Counsel*

Plaintiffs' Counsel in this case enjoy a high professional standing and are uniquely qualified to represent the Plaintiffs in attorney preference class actions by virtue of their experience in this specialized area of the law.

Steven W. Hamm, Mary S. League, and C. JoAnne Wessinger (Richardson, Plowden, Carpenter & Robinson, P.A.); T. Alexander Beard (Beard Law Offices); D. Michael

Kelly, John D. Kassel, Bradford P. Simpson and B. Randall Dong (Suggs & Kelly Lawyers, P.A.); Mary Leigh Arnold (Mary Leigh Arnold, P.A.); Charles L. Dibble (Dibble Law Offices); Charles L.A. Terreni (Terreni Law Firm); C. Richard Kelly (C. Richard Kelly, P.A.) Thomas M. Fryar (Drose Law Firm); and Daniel W. Williams (Bedingfield & Williams) all have been involved in "attorney preference" class action cases. Professor Freeman stated in his affidavit and testimony before me that several of these lawyers "can lay claim to having virtually invented the genre of attorney preference class actions." *See* Freeman Affidavit at ¶26. Apart from the testimony of Professor Freeman, I have also had the opportunity to observe directly the special competence and expertise of Class Counsel in this case over the past two years. I conclude that because of Counsel's substantial and beneficial experience in consumer class actions of this nature and magnitude, they are entitled to additional consideration in deciding attorney's fees.

4. *Contingency of Compensation*

The Named Plaintiffs in this case all have executed contingency contracts in which they have agreed to a fee of one-third of the recovery. Plaintiff's Counsel have advanced all costs in this litigation without any expectation of reimbursement except in the event of recovery on behalf of the Plaintiff Class. Collectively, Counsel placed $36,504.47 at risk in costs advanced in the Green Tree matters, exclusive of any lobbying expenses or the value of the time spent by attorneys and staff members in the handling of this action. Counsel spent over $56,600 for the costs of lobbying to preserve Plaintiffs' cause of action in the General Assembly. A portion of these expenses should be deemed at risk for the purposes of considering the contingent nature of the case.

5. *Beneficial Results Obtained*

The benefit achieved by the Petitioners for the Plaintiff Class in the instant case has an aggregate value in excess of

$9.2 Million, exclusive of costs and expenses to be awarded by this Arbitrator. This is especially extraordinary in light of the difficult conditions under which the Plaintiffs' Counsel handled this case.

6. *Customary Legal Fees for Similar Services*

In *Blum v. Stensen,* 465 U.S. 886, 104 S.Ct. 1541 (1984), the U.S. Supreme Court held that customary fees for like work are "to be calculated according to the prevailing market rates in the relevant community." 104 S.Ct. at 1547 (emphasis added).

As the South Carolina Supreme Court found in *Global Protection Corp. v. Halbersberg,* 332 S.C. 149, 503 S.E.2d 483 (1998), the customary fee in South Carolina for complex cases accepted on a contingent-fee basis ranges from one-third to one-half of the gross recovery. While *Global Protection Corp.* was not a class action, its difficulty and complexity make it relevant here.

In the class action context, courts have likewise awarded substantial fees based upon a percentage of recovery. The "relevant community" for like work in this case is that community of class action litigation lawyers involved in complex civil cases. Professor Newberg, cited *supra,* has written that "the relevant community may potentially be the forum, out-of-state forums, or a uniform national rate." Newberg, *supra*, note 23 §414 at 142.

Citing such circumstances as the complexity and expense of class action litigation, multiple parties, and the involvement of "national defendants who normally will be represented by national, as well as local counsel," Professor Newberg states:

> Courts have recognized that these and other circumstances make a local forum rate for compensation . . . an inappropriate and illogical standard, in contrast to

> . . . the growing adoption by courts of national rate standards.
>
> Newberg, *supra*, note 23 §415 at 143.

Professor Freeman attached to his affidavit in support of the fee request in this case copies of two other recent class action cases in which he testified about fee reasonableness and other issues. In one of these cases, *In re State of Florida v. American Tobacco Co.,* (Arbitration Award dated September 11, 1998), the arbitrators awarded plaintiff's counsel a fee of in excess of $3.4 Billion. In the other, *Ramos v. Philip Morris Companies, Inc.,* 743 So.2d 24 (Fl. App. 1999), the Florida Court of Appeals affirmed a fee award of over $46 Million. These cases illustrate the fact that class counsel are very well compensated as a rule when they provide a benefit to class members. The reasonableness of attorney fee awards in class actions should not be confined to any single element such as the number of hours spent in achieving a beneficial result for the class.

The class action cases cited by Professor Freeman and by Class Counsel were virtually all settled, rather than tried. Because this case required the Plaintiffs to brief and argue an appeal and fight off two efforts by Green Tree to stop the litigation with an injunction; engage in an expensive, time-consuming legislative battle; independently gather statewide information without the aid of traditional discovery; and try the case before an arbitrator, they are entitled to a reasonable attorneys fee of $3,066,666.00 in addition to the judgment of $9,200,000.00 obtained on behalf of the Plaintiff Class.

7. *Conclusion*

Based upon a careful review of the materials, cases, affidavits and testimony submitted and applying the relevant precedential authority to the facts and record before me in this case, I have concluded that a reasonable fee of $3,066,667.00 should be awarded for counsel for the plaintiff class in

addition to the civil penalty award to be paid to members of the plaintiffs class in the amount of $9,200,000. I also find the plaintiffs should be reimbursed for their reasonable costs associated with the prosecution of this case in the amount of $18,252 which is one half of the $36,504.47.

II. UNCLAIMED FUNDS AND ADMINISTRATION OF CLASS

Counsel for plaintiffs have requested that any funds awarded to class members who cannot be located after reasonable efforts to locate all intended payees be provided to the South Carolina School of Law, South Carolina Habitat for Humanity, Shriner's Hospital and Global Outreach. After careful consideration, I conclude that the request to distribute unclaimed funds to the above referenced charitable organizations should be granted. Six months after Green Tree tenders the then applicable judgment amount, including applicable interest class counsel shall distribute any remaining unclaimed funds by tendering 75% of such funds to the South Carolina School of Law, 9% to the South Carolina Habitat for Humanity, 8% to the Shriner's Hospital, and 8% to Global Outreach.

Any interest earned after deposit of the applicable judgment amount including interest, if any, into Plaintiffs Counsel's trust account may be applied to reasonable administrative costs. In recognition of the Named Plaintiffs willingness to serve as class representatives and to assist in the prosecution of this case on behalf of all class members, the named plaintiffs shall receive a distribution as noted below. After payment of reasonable administrative costs such remaining interest shall be distributed to the Named Class Representatives in an amount not to exceed $50,000 divided equally among such class representatives on a per transaction basis. Any funds remaining after payment of reasonable

administrative costs and payment to the named class representatives shall be paid to the Cy Pres. Within 45 days of final distribution of any unclaimed funds, Plaintiffs counsel shall file an accounting with the appropriate court. It is expressly directed that class counsel utilize their best efforts to locate all class members and award them the $5,000 referenced in this Order. Any costs associated with efforts to locate class members associated with unclaimed funds shall be deducted from the $5,000 allocated to such class members when located if funds from interest paid into the trust account are not sufficient to cover such costs.

Plaintiffs have also requested that I issue an Order authorizing the Plaintiffs to seek addresses from credit reporting agencies of any class members who cannot be located based upon addresses currently available to Class Counsel. Accordingly, I have attached a separate Order authorizing the counsel for Plaintiffs to obtain addresses from credit reporting agencies in accordance with the Federal Credit Reporting Act 15 U.S.C. § 1681b(a)(1).

AWARD

Based upon careful review of the materials, cases, affidavits and testimony presented by counsel for the Plaintiffs and by Green Tree, and applying the relevant precedential authority to the facts and record before me in this case, I have concluded that Green Tree's behavior in this matter was wilful, wanton and egregious, and therefore, awarded Plaintiffs the sum of $9,200,000.00. I also find the Plaintiffs should be reimbursed and awarded certain reasonable costs associated with the prosecution of this case in the amount of $18,252. I further conclude that a reasonable attorneys fee of $3,066,666.00 should be awarded to members of the Plaintiffs' class.

Thus, I conclude that a judgment should be entered against Green Tree in the total amount of $12,284,918.

IT IS SO AWARDED.

/s/ Tom J. Ervin

Arbitrator TOM J. ERVIN

July 24, 2000

APPENDIX F

ARBITRATION AGREEMENT CONTAINED IN CONSUMER RETAIL INSTALLMENT

ARBITRATION—All disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract, or the validity of this arbitration clause or the entire contract, shall be resolved by binding arbitration by one arbitrator selected by us with consent of you. This arbitration contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. section 1. Judgment upon the award rendered may be entered in any court having jurisdiction. The parties agree and understand that they choose arbitration instead of litigation to resolve disputes. The parties agree and understand that they have a right or opportunity to litigate disputes through a court, but that they prefer to resolve their disputes through arbitration, except as provided herein. THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL, EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO A COURT ACTION BY US (AS PROVIDED HEREIN). The parties agree and understand that all disputes arising under case law, statutory law, and all other laws including, but not limited to, all contract, tort, and property disputes, will be subject to binding arbitration in accord with this contract. The parties agree and understand that the arbitrator shall have all powers provided by the law and the contract. These powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief. Notwithstanding anything hereunto the contrary, we

retain an option to use judicial or non-judicial relief to enforce a mortgage, deed of trust, or other security agreement relating to the real property secured in a transaction underlying this arbitration agreement, or to enforce the monetary obligation secured by the real property, or to foreclose on the real property. Such judicial relief would take the form of a lawsuit. The institution and maintenance of an action for judicial relief in a court to foreclose upon any collateral, to obtain a monetary judgment or to enforce the mortgage or deed of trust, shall not constitute a waiver of the right of any party to compel arbitration regarding any other dispute or remedy subject to arbitration in this contract, including the filing of a counterclaim in a suit brought by us pursuant to this provision.